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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

No. 73-245

NICK DRASKOVICH, Et Al.,
Petitioners,

vs.

NOVAK PASALICH, Et Al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-entitled case on May 7, 1973.

REFERENCE TO OPINIONS BELOW

An opinion under date of August 8, 1968, of the Judge of the Circuit Court of Elkhart County has not been officially reported. It is presented in Appendix, *infra* p. 13, and, as printed, embodies the Order.

An opinion under date of March 20, 1972, of the appropriate Court of Appeals of Indiana is reported at 280 NE 2d 69. It is presented in Appendix *infra* p. 17, and, as printed, embodies the Order.

A ruling under date of August 11, 1972 on present Petitioner's motion for reconsideration by the Court of Appeals has not been reported. It is presented in Appendix, *infra* p. 41, and, as printed, embodies a dissenting opinion.

JURISDICTIONAL STATEMENT

Pursuant to Indiana practice, there was simply endorsed on the original of present Petitioner's Petition to Transfer to the Supreme Court of Indiana a denial of this discretionary appeal on May 7, 1973, notice of which was immediately transmitted to all counsel. (App. p. 43)

This was a final judgment of the highest court of Indiana in which a decision could be had. It allowed to stand an order of the Indiana Court of Appeals believed to be in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

Jurisdiction is invoked under 28 U.S.C.A. 1257(3).

QUESTION PRESENTED

Is this a correct interpretation of the Constitutional law of this country as set forth in *Presbyterian Church in the United States versus Mary Elizabeth Blue Hull* 393 U.S. 440, and *Maryland and Virginia Eldership versus Church of God at Sharpsburg,* 396 U.S. 367. "Confronted with the necessity to resolve a dispute about the use of church property, where it is admitted that the local church has governing by-laws and that the Diocese and the Mother Church both have governing written constitutions, a civil court is precluded from enforcing those aspects of those documents which in secular language set forth the bases for control over church property because those multi-faceted documents contain religious reference."

CONSTITUTIONAL PROVISIONS

The constitutional provisions which petitioner contends have been violated by the judgment of the Court of Appeals of the State of Indiana are the following:

Amendment I of the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

Amendment XIV of the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND PRESENTATION OF THE FEDERAL QUESTION

One of the many autocephalous Eastern Orthodox Churches is the Serbian Church, having its See in Belgrade, with a Diocese in the United States and Canada, headed by a bishop. In 1963 Belgrade took action which they believed (and believe to this day) resulted in the suspension and defrocking of the Bishop, and in the dissolution of the Old Diocese and the creation of three new ones.

Furor ensued in the Serbian communities of this country and Canada, resulting in multiple litigation. One of those cases has twice been before this Court, *St. Demetrius v. Kelemen*, 393 U.S. 527. Certiorari granted and remanded for further consideration in light of *Mary Blue Hull*. The same case, 400 U.S. 827. Certiorari denied. (The under-

signed was counsel for petitioner in the first and for respondent in the second.)

By 1966 it had become apparent in South Bend that the probable majority of the congregation wished to leave the Old Diocese and go with the new structures. Present petitioners initiated this action in the Elkhart Circuit Court, seeking an injunction against the diversion of the church property from its historical purpose. The trial court, after eight weeks of testimony, issued an order (Appendix p. 15) carefully avoiding any determination of ecclesiastical questions and reciting simply, that, "The South Bend Church is a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada," and, "That the defendants (respondents here) have dissolved their allegiance to the Serbian Eastern Orthodox Diocese of the United States and Canada, and have transferred their allegiance and loyalty to a newly established diocese."

Appeal was taken. As is permissible under Indiana Procedure, an attempt was made to bypass the intermediate or appellate court and to have the Indiana Supreme Court review the Constitutional questions. In January of 1972 the Supreme Court of Indiana declined review in that immediate fashion. In March of 1972, the Indiana Court of Appeals issued an opinion in this case (Appendix p. 17) 280 NE 2969 reversing the trial court and awarding control of the property to the defendants (respondents here) on the basis of their "loyalty to the Mother Church".

Petition for rehearing was filed with the Court of Appeals, and ruled on (Appendix p. 41) by the same judges who wrote the March '72 opinion. One of them partially reversed himself and recited that hearing ought to be granted on the basis of an opinion of the Supreme Court

of Ohio 21 O.S. 2d 154. That opinion is the direct result of this Court's remand of 393 U.S. 527.

Appeal was taken to the Supreme Court of Indiana which was denied on May 7, 1973, without opinion. (App. p. 43)

There was no federal question presented when the circuit court made its determination on the basis of written secular documents establishing administrative links with the Diocese, an Illinois corporation. Only when the Court of Appeals awarded control of the property to defendants on the basis of their spiritual loyalty to the Mother Church, a loyalty powerful enough to transcend the local by-laws and Diocesan Constitution, was the federal question raised.

First in the petition for rehearing to the Court of Appeals (resulting in the partial reversal described above) and then again in its "Petition to Transfer to the Supreme Court of Indiana" present petitioners have asserted that the civil courts of Indiana may not award control over the use of the South Bend Church on the basis of their determination of disputed questions about the internal allocations of power within the church structure.

Petitioner is then appealing from the opinion and order of the highest court of the State of Indiana from which an opinion was, or could have been obtained, and is now presenting to the Court its Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

In an attempt to make this petition as clear and cogent as possible, this writer, as a working aid, reviewed his previous successful petition involving the same controversy. Much of the type of argument then made is no longer necessary. After *Mary Blue Hull* and *Sharpsburg*, it is obvious that all aspects of the First Amendment

through the Fourteenth Amendment are applicable to state court proceedings. Yet, it is not obvious—not obvious in Indiana.

In an attempt to eludicate the meaning of *Mary Blue Hull* Mister Justice Brennan in January of 1970 in *Maryland and Virginia Eldership versus Church of God at Sharpsburg* 396 U.S. 367, 368 ff. wrote a separate concurring opinion. Prior to analysis of the Indiana opinion from which appeal is here being taken, this writer had assumed the following two sentences from Mr. Justice Brennan's opinion to be central to any resolution of church property disputes: "To permit civil courts to probe deeply enough into the allocations of power in a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determinations of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy."

The Justices of this court will make their own determinations about the meaning and impact of the opinion thought to be erroneous. As it is read it becomes clear that the Indiana Court of Appeals felt that the basis of the decision of the trial court was that court's decision that Belgrade could not abolish the Old Diocese and create three new ones. The circuit Judge did not make such a determination. (App. p. 13-16) Implicit in his ruling is an acceptance of the new dioceses. He simply ruled that the church property was dedicated by documents in evidence to the use and control of the Old Diocese and that those wishing to switch the use of the church property to the new dioceses could not. This determination was obviously on the basis

of Article 4 of the Diocesan Constitution (Appendix p. 22) which says that the Church is a member of the Diocese and Article 2 of the local Church's by-laws (Appendix p. 28) which says that the S. Bend Church belongs to the Diocese.

These are formally adopted rules governing this church and its component parts—plain language—and the trial court judge issued an injunction enforcing these documents in the same fashion as he might have done in a dispute about control of property arising in the context of a labor union dispute, a veterans organization dispute, or a dispute about the property of any non-religious group.

It is the judges of the Court of Appeals who entered the "forbidden thicket". They examined the governing documents and made an initial determination that the Serbian Orthodox Church is "hierarchial". Petitioners concede that it is in every religious and ecclesiastical way. However once past that obvious concession, the church structure is not hierarchial, not in the monolithic sense of Roman Catholicism. As was demonstrated by the documents admitted into evidence, the local congregation may by vote reject priests; the local congregation's own property is free of any superior right in the Diocese or in the Mother Church; it sends delegates to national assemblies and elects members to Diocesan boards which govern over the Diocesan property; and the Serbian Church is in many other ways one of mixed hierarchial and congregational polity.

As was demonstrated in the trial, the Diocese in the United States is the only Diocese in the Yugoslavian church structure which has its own written constitution. The American Diocese is the result not of missionary efforts and establishment by the Mother Church but is the natural result of early 20th century immigration of Serbians to

this country, their own joining together, and then their voluntary reuniting by written compact with the Patriarchate. For unknown reasons Belgrade insisted on dividing the only diocese in the non-Communist world and in 1963 attempted to do so. The question as to their right to do so has been in litigation ever since. In *Serbian Eastern Orthodox Diocese versus Ocokoljich,* 72 Illinois Appellate 2nd 444 (1966) it was decided in a case where all the contending bishops and all the contending dioceses were parties that Belgrade was bound by its own written instruments, and that it was without power to create three new dioceses out of the ashes of the Old. That determination was made again this spring in another chapter of the same case in an opinion and order not yet officially reported. (Appendix p. 45)

The Indiana Court of Appeals once having decided that the church had hierarchial aspects, avoided any other determination. In the fashion of Pontius Pilate they simply "washed their hands". The effect of this is, of course, to say that: "Whatever Belgrade wants, Belgrade gets," but more profoundly *it is very clearly the establishment of religion by a civil court* in the face of contradictory documents and in the midst of a dispute as to power sources.

The Court of Appeals has come to the aid of Belgrade—has ignored the by-laws of the South Bend Church—has ignored the constitution of the Illinois corporation—and has given its injunctive power to assist those South Bend Serbian churchgoers who want to go with Belgrade rather than stay with the Diocese. Obviously at the point the Court of Appeals did this, they made a determination about the "allocation of power within the church"; they made a determination as to "the identity of the governing body or bodies that exercise general authority within the church". This is exactly the sort of determination which

Mr. Justice Brennan (in the quotation which begins petitioners' argument) made it clear the Court should avoid.

An additional result of this opinion was to select one group of the disputants for preferred treatment. *Mary Blue Hull* and *Sharpsburg* are certainly the most compelling cases from Petitioner's stand-point, but this Court spoke to this narrower question long ago. In *United States v. Ballard* 322 U.S. 78 (1943) Mr. Justice Douglas, for the majority, stated: ". . . the Constitutional guarantee of religious freedom does not select any one group . . . for preferred treatment but puts them all in that position." Accordingly, under *Ballard,* the opinion appealed from is clearly not in accord with ruling precedents.

Certainly when the written compacts now found twice in the Illinois litigation to control the Bishops and the Diocese were ignored by Belgrade that amounted to an instance of a church ruling which was "arbitrary" in the extreme. Under *Gonzalez versus Roman Catholic Archbishop,* 208 U.S. 1, the Court should have examined Belgrade's acts prior to deciding to enforce them. The Illinois Court conducted such an examination and decided not to enforce those acts. The Indiana Court felt that it was barred from such an examination and subsequently decided to enforce those acts.

It never was this Court's intent that all disputes involving churches, their property, and their members were to be insulated from court intervention. This would result in anarchy. There must be a civilized way to resolve disagreements. The Court of Appeals of Indiana has grossly oversimplified the Court's ruling by taking the position that once they receive an inkling that the church in front of it has hierarchial aspects or that church-connected documents have ecclesiastical references contained in them, they must

thereafter simply enforce all orders of bodies claiming to be superior and may not examine the documents in front of them to see what secular force those documents have. In this instance the result of the Indiana opinion is to rip away Indiana property from its connection with an Illinois corporation in order to directly tie it in some metaphysical way with Belgrade.

To accomplish this the Court of Appeals made these startling pronouncements:

1. "Beliefs and practices in regard to the ownership of property are primarily religious and not secular." (Appendix p. 34); and,

2. ". . . the parts of the Constitution of the Mother Church and the United States and Canada Diocese relating to the ownership of property are clearly interspersed and interrelated with the other provisions relating to religious rites . . . these two constitutions are basically religious and not secular documents." (Appendix p. 34)

The argument is then made that, because property beliefs are religious, and because the property-governing documents are religious, the Court is not permitted to look at them.

Much attention is paid herein to the concurring opinion in *Sharpsburg,* but the *per curiam* opinion is, after all, the opinion of the Court. Note this quotation: ". . . the Maryland Court of Appeals *relied upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property.* (emphasis supplied) . . . Since the Maryland court involved no inquiry into religious doctrine . . . the appeal is dismissed." 396 U.S. 367 Supposedly controlled by *Sharpsburg,* the Indiana

court felt that it could not look at *pertinent provisions of the church constitutions.* It is difficult to conceive of a ruling more divergent from previous precedent.

There are other Serbian churches in Indiana faced with this opinon, an alarming precedent if allowed to stand. Is it the law that Belgrade has more power over its churches than Rome has over its churches? Is it the law that Belgrade has the power to control the use of Indiana property? If it is, it is the law only in Indiana.

In the other jurisdictions where litigation has ensued, the limited role of Belgrade in the secular affairs of church property in the United States of America has been recognized. If this is the law in Indiana then it is so because this Court allows the opinion here in question—an opinion not in accordance with governing Constitutional precedent—to stand.

CONCLUSION

For the foregoing reasons we submit the question presented by this petition as to the necessity of a civil court to fairly assist disputants in front of it rather than retreat by the simple act of labeling a dispute as "ecclesiastical" is substantial, and raises an issue under the First and Fourteenth Amendments of such weight as to merit the attention of this Court. We urge this Court to note probable jurisdiction and to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Judgment and Decree of the Circuit Court of Elkhart County, August 8, 1968

This cause having come on for trial upon the issue joined by the plaintiffs' complaint and the defendants' answer thereto and the court having heard the evidence and argument of counsel and having had this cause under advisement and being duly advised in the premises now finds for the plaintiffs and against the defendants, that the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana is a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada; the property, both real and personal, of said church and school parish is held in trust for the people of South Bend, Indiana and vicinity who are of the Serbian Orthodox faith and who are loyal to the Serbian Eastern Orthodox Diocese of the United States and Canada and has been consecrated to the use of the Serbian Orthodox Church and School Parish of St. Peter and St. Paul as a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada.

It is not the duty of this court to decide whether the diocesan bishop was justly or unjustly defrocked. This question is purely within the jurisdiction of the church government with headquarters at Belgrade and will not be disturbed by the courts.

There is no evidence that the defendants, nor those acting in concert with them, have been or are influenced or

in any way connected with the communist government of Yugoslavia or any other communist group.

The defendants and those acting in concert with them have dissolved their allegiance to the Serbian Eastern Orthodox Diocese of the United States and Canada and have transferred their allegiance and loyalty to a newly established Middle Western American Diocese of the Serbian Orthodox Church and have appropriated and continue to occupy, use, manage, control and devote the property of said church and school parish to the use and benefit of those bearing allegiance to said newly established diocese and/or to the use and benefit of said newly established Middle Western American Diocese of the Serbian Orthodox Church in violation of the trust imposed upon said property.

All actions of the officers and of the governing bodies of said church and school parish and the implementation of all decisions by any and all of them and of the defendants and those acting in concert with them incident to, designed or intended to dissolve allegiance of the church and school parish to the Serbian Eastern Orthodox Diocese of the United States and Canada with its See at Libertyville, Illinois, governed by the corporation of that name organized under the laws of the State of Illinois are null and void.

The plaintiffs herein and all others similarly situated who are united in interest have maintained allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada and as members of said church and school parish have resisted and objected to the use of said church and school parish property for the use and benefit of those bearing allegiance to said newly established diocese and/or to the use and benefit of said newly

established Middle Western American Diocese of the Serbian Orthodox Church and are entitled to have said church property devoted to the exclusive use and benefit of those maintaining allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada in compliance with the trust imposed upon said property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court:

1. All actions of the officers and of the governing bodies of the Seriban Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana, and the implementation of all decisions by any and all of them and of the defendants and those acting in concert with them incident to, designed or intended to dissolve allegiance of the said church and school parish to the Serbian Eastern Orthodox Diocese of the United States and Canada with its See at Libertyville, Illinois, governed by the corporation of that name organized under the laws of the State of Illinois are null and void.

2. The property, both real and personal, owned by the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana, shall be occupied, used and devoted to the exclusive use and benefit of those who do now maintain or who may hereafter establish or reestablish and maintain allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada.

3. The defendants and all those acting in concert with them who refuse to establish or reestablish allegiance and loyalty to said Serbian Eastern Orthodox Diocese of the United States and Canada be and they hereby are

permanently enjoined from asserting or exercising any claim or right to the occupancy, possession of, or use of the property, real or personal, belonging to the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana.

4. The defendants and all those acting in concert with them as aforesaid be and they hereby are permanently enjoined from doing any act or continuing any act or action which interferes with or is calculated or intended to interfere with the free and exclusive occupancy, possession, and use of the property, both real and personal, of said church and school parish by those who now maintain or who may hereafter establish or reestablish and maintain allegiance and loyalty to the Serbian Eastern Orthodox Diocese of the United States and Canada.

5. That the plaintiffs recover of defendants the costs of this action in the sum of $—.

All of which is finally ordered, adjudged, and decreed by the court this 15th day of August, 1968.

/s/ Aldo J. Simpson

ALDO J. SIMPSON, Judge
Elkhart Circuit Court

OPINION OF THE COURT OF APPEALS OF INDIANA

(Decided March 20, 1972)

This case involves a dispute between two contesting groups in the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul in South Bend, Indiana, hereinafter called local church, for the use and control of the church property.

To understand the contentions of the parties it is necessary to outline certain developments within the Serbian Eastern Orthodox Church whose See is in Belgrade, Yugoslavia, hereinafter called Mother Church, particularly certain events in the year 1963 and since.

Generally the Mother Church is a part of the Eastern Orthodox branch of the Christian religious community which traces its practices through the division with the Roman Catholic Church in the 11th Century to the Council of Nicea in the year 325 A.D. There have been literally libraries written describing these historical events. One of the most succinct statements in this regard is set forth by the Supreme Court of Michigan in *Hanna v. Malick*, 223 Mich. 100, 193 N.W. 798 (1923).

The rites, doctrines, polity and practices of the Serbian Eastern Orthodox Churches are closely related to those of the Eastern Orthodox Churches which developed in other eastern European and near eastern areas such as the Russian, Greek, Bulgarian and Romanian Eastern Orthodox Churches, and were the result of several centuries of development. Thus, the rites, doctrines, polity and practices are often complex and difficult for the un-

initiated to understand. This fact is well born out in this case where we have a trial that lasted eight weeks producing a transcript of 4229 pages in nine separate volumes. A substantial portion of the trial of this case was an in-depth consideration of the rites, doctrines, polity and practices of the Mother Church and the Serbian Eastern Orthodox Diocese of the United States of America and Canada, hereinafter called United States and Canada Diocese, as well as the local church.

Prior to May 10, 1963, the local church was a constituent part of the United States and Canada Diocese of the Mother Church. This diocese as then constituted comprised the entire territory of the United States and Canada and was one of the dioceses of the Mother Church. The spiritual head of the Mother Church was the Serbian Patriarch and the power of appointment was vested in the Holy Assembly of Bishops, also known as the Holy Episcopal Council. Before May 10, 1963, Bishop Dionisije was designated as Bishop of the United States and Canada Diocese by the Holy Assembly of Bishops. On that date the Holy Assembly with the approval of the Patriarch divided the United States and Canada Diocese into three new dioceses and added some new territory from Africa and South America. New Bishops were appointed in each of the three new dioceses. Bishop Dionisije opposed this division and sought the support of others. Dionisije was later defrocked on March 15, 1964. In general, the Plaintiffs-Appellees are supporters of Dionisije in the local church and the Defendants-Appellants are loyal to the Mother Church and desire to retain the hierarchical connection with the Mother Church.

In 1966, the Appellees brought an action for injunction to prohibit the Appellants from exercising control and

ownership of the property in South Bend, Indiana. The prayer for relief in the Appellees' Petition for Injunction is revealing of the subject matter of the action. It states:

> "WHEREFORE, plaintiffs pray that the defendants comprising the Board of Trustees of the church and the defendant Walter Milovich and each and every person acting in consort with them be restrained and enjoined from convening, conducting or holding any meeting of the membership of the church on March 22, 1964, and from submitting thereto any proposal to determine, by majority vote or otherwise, whether the membership of the church recognizes church affiliation with the mother church, the Serbian Orthodox Holy Synod, the Serbian Orthodox Holy Council of Bishops, and the Serbian Orthodox Bishop Firmillion Ocakoljich, or from doing any other act or causing any other member or group of members of the church to do any act calculated or intended to or which might separate or tend to separate the church from the Serbian Eastern Orthodox Diocese of the United States of America and Canada in defiance of the ecclesiastical laws, usages, customs and principles which are accepted by all members of the church prior to the pretended dissolution of the Serbian Eastern Orthodox Diocese of the United States of America and Canada in 1963 pending the giving of notice to the defendants of the hearing and the hearing on plaintiffs' application for temporary injunction, and that after due notice and hearing the defendants and all others acting in consort with them be temporarily and permanently enjoined as prayed for herein and plaintiffs be granted all other and proper relief."

The trial court entered special findings and conclusions and granted a permanent injunction for the Appellees on August 15, 1968. The essential finding and conclusion which is in dispute is the determination that the

Mother Church was without legal authority to divide the United States and Canada Diocese and therefore such action was null and void. Such decision necessarily removes the control and use of the property where the local church is located from the group which has remained faithful to the Mother Church.

The period between August 15, 1968, when the trial court entered judgment and late 1971 was taken up in the lengthy process of perfecting this appeal. This appeal was originally filed in the Supreme Court of Indiana which transferred it to this court for consideration on the merits by order on January 10, 1972. The Appellants have also filed a Brief in four volumes consisting of 1020 pages for our consideration. We realize that in cases such as this emotions run high. Counsel for all parties and the trial judge have handled this difficult case in a highly professional manner and are to be commended.

There are two questions which we must consider:

1. The nature of the church organization involved in this dispute.

2. Whether the decision of the trial court transgressed the boundaries of the First Amendment to the Constitution of the United States.

Notwithstanding the limitations imposed on the civil courts, which we will detail later, the civil courts can (and indeed must in some cases) look at ecclesiastical documents and related evidence concerning religious rites, doctrines, polity and practices for the limited purpose of determining the nature of the church organization.

The landmark and oft cited case, *Watson v. Jones,* 13 Wall 679, 80 U.S. 679 (1872), sets forth and defines the

three general categories of such organizations, the same being congregational, connectional and hierarchical. While the facts often do not fit neatly into these molds, and some church organizations represent a blend of more than one kind, the definitions are sufficient for us here.

We are here asked to review a massive volume of documentary evidence related to this and other issues. It is still the law of Indiana that upon appellate review the appellate tribunal is in as good a position as the trial court to interpret documentary evidence. Both parties have urged this rule on this court for a proper determination and have relied on Wiltrout, Indiana Practice, Vol. 3, §2786.

In *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952), the Supreme Court of the United States said: "hierarchical churches may be defined as (1) those organized as a body with other churches (2) have a similar faith and doctrine (3) with a common ruling convocation or ecclesiastical head . . ." 344 U.S. 110.

Some of the relevant articles are set forth and discussed below. The constitution of the United States and Canada Diocese contains 163 articles covering 33 pages in the transcript and the constitution of the Mother Church contains 269 articles which is published in a booklet of 82 pages. In addition there are the by-laws of the local congregation for the year 1916 which consists of 31 articles and the 1953 by-laws of the local congregation consisting of 86 articles for the church in addition to 32 articles for the local church club. There is also the articles of incorporation of the Serbian Society of St. Peter and St. Paul's Church of South Bend, Indiana, in 1928 consisting of four articles.

Article 1 of the Diocesan Constitution provides:

"The Serbian Orthodox Diocese in the Northern States of American and Canada is ecclesiastically-judicially as an organic part of the Serbian Patriarchate in the Kingdom of Yugoslavia and enjoys all the benefits which orginate therefrom."

Article 2 of the Diocesan Constitution provides:

"All statutes and rules which regulate the ecclesiastical-canonical authority and position of the Serbian Orthodox Church in the Kingdom of Yugoslavia are also compulsory for the Serbian Orthodox Diocese in the United States of North America and Canada, with the exception of specific cases which must be formulated with regard to local circumstances in accordance with ecclesiastical and judicial principles."

Article 3 of the Diocesan Constitution provides:

"The jurisdiction of the Serbian Orthodox Diocese in the United States of America and Canada with its Diocesan See in Chicago, includes the entire political territory of the United States of America and Canada, which as such by its geographical location enjoys full administrative freedom and accordingly, it can independently regulate and rule the activities of its church, school and other diocesan institutions and all funds and beneficiaries, through its organs, but in accordance with the laws of this constitution and in agreement with the laws of the United States of America and Canada.

Article 4 of the Diocesan Constitution provides:

"The Serbian Orthodox Diocese in the United States of America and Canada is comprised of Serbian Orthodox Church-school Congregations — Parishes, churches, monasteries, archpresbyterates, established within the territory of the above mentioned states

and which fall under the spiritual, executive, ecclesiastical—judicial and controlling authority of the diocesan organs (Bishop and Diocesan Council). Therefore, every Serbian Orthodox Church—school Congregation, church monastery, and archpresbyterate already existing or which shall be established in the above mentioned territories must be in ecclesiastical—canonical bond with this Diocese and recognize its authority and power."

Article 9 of the Diocesan Constitution provides:

"The Bishop of the Serbian Orthodox Diocese in the United States of America and Canada is appointed by the Holy Assembly of Bishops of the Serbian Patriarchate."

Article 10 of the Diocesan Constitution provides:

• • •

"The following comes within the jurisdiction of activity of the diocesan bishop:

(a) to preserve, defend and sustain among the people, One, Holy, Ecumenical and Apostolic church and repeal all activities contrary to Orthodoxy;

• • •

(h) to execute all canonical orders of the Holy Assembly of Bishops;

• • •

(o) To inform the clergy and laity of various canonical directives from the Holy Pontifical Synod;

(p) To submit to the Holy Bishop's Assembly of the Serbian Patriarchate an annual report of his archipastroal activities; and . . .".

Article 12 of the Diocesan Constitution provides:

"The Diocesan Bishop in the United States of America and Canada is obliged to recognize as the head of the Serbian Patriarchate, the Archbishop of Ipek, Metropolitan of Belgrade-Karlovac and Serbian Patriarch, whom he mentions in all services. He shall not make any changes or innovations in the established order and work of the church without prior agreement with him.

"Accordingly, the Diocesan Bishop shall submit to the Serbian Patriarch for review, all regulations which may be issued by any diocesan authority, which shall if they touch upon the sphere of internal church administrations, be subject to, the approval of the Holy Pontifical Synod, as the highest executive church authority.

"Should the Diocesan Bishop find by his own assurance, that the decisions rendered by any church authority or organ are contrary to the teachings of the Holy Church, her regulations and canons, or to the vital interest of the church, he shall halt the execution of such decision and submit the matter for rediscussion and redecision. If he again is not in accord with redecision as reconsidered, he shall submit the case for final decision to a higher authority and if necessary, to the Holy Pontifical Synod."

Article 13 of the Diocesan Constitution provides:

"In the event of illness or absence, the Diocesan Bishop assigns his own substitute and designates his authority. When the seat of the Diocese Bishop is vacated, the administration of the widowed diocese is upheld in all her spiritual and administrative matters by the Ecclesiastical Court and the Diocesan Council until the appointment of an administrator, which appointment is made by the Serbian Patriarch with the Holy Pontifical Synod."

Article 14 of the Diocesan Constitution provides:

• • •

"The Diocesan Bishop is at the same time the supreme head of the St. Sava Monastery in Libertyville. He appoints the abbot of same and conducts the canonical supervision and the higher executive authority over the monastery.

Article 53 of the Diocesan Constitution provides in part:

"Decisions made by the Diocesan Bishop alone or together with the Diocesan Ecclesiastical Court, have the validity and power of decrees of Ecclesiastical Courts in the first instance. The highest and final instance in the Holy Bishop's Synod."

Article 56 of the Diocesan Constitution provides:

"Court procedures and order of business of the Ecclesiastical Court will be prepared by the Ecclesiastical Court itself with the approval of the Holy Bishop's Assembly of the Serbian Church.

"If the Bishop should disagree with the decision of the Diocesan Ecclesiastical Court, as well as with the decision of some Diocesan committee or Diocesan Council, the matter in question will be sent to the Holy Bishop's Synod of the Serbian Church for final Decision."

Article 156 of the Diocesan Constitution provides:

"All real estate and personal property of the St. Sava Monastery in Libertyville as well as the other Serbian Monasteries should they be organized, is supervised by the monastery's administration under the direct control of the Diocesan Bishop.

The fundamental set of rules governing the Mother Church are set forth in Article 7 of its own Constitution.

The Constitution of the Mother Church so establishes the subordinate relation to the Diocese in the United States.

Article 1 of the Mother Church Constitution provides:

"The Serbian Orthodox Church is one, undivided, and autocephalous. The Church confesses publicly its religious teachings, performs publicly its religious services, and governs and regulates independently all its religious affairs. * * *"

Article 2 of the Mother Church Constitution provides:

"The Serbian Orthodox Church has a rank of a Patriarchate."

* * *

Article 5 of the Mother Church Constitution provides:

"The legal persons in the Serbian Orthodox Church are these: Patriarchate, dioceses, church congregations, monasteries, foundations, independent institutions or such funds designated for places of worship.

"These legal persons may, in accordance with legal regulations, acquire and hold either personal or real properties, and have all the rights and obligations in that capacity."

* * *

Article 8 of the Mother Church Constitution provides:

"Organization of the Serbian Orthodox Church is church-hierarchical and church-administrative.

"All the church spiritual, disciplinary and legal authority, in accordance with the canons and rules of the Serbian Orthodox Church, belongs exclusively to the hierarchy. This authority is exercised through its hierarchical representatives and organs.

* * *

Article 10 of the Mother Church Constitution provides:

> "In the Serbian Orthodox Church there are church hierarchical and administrative authorities bodies and organs:
>
> 1. Patriarch, Holy Bishops Council and Holy Synod, High Ecclesiastical Court, Patriarchal Council and Patriarchal Board;
>
> 2. Diocesan Bishop, diosecan ecclesiastical court, diocesan council and diocesan executive board;
>
> 3. Bishop's vicar;
>
> 4. Parish priest;
>
> 5. Church congregational council and church congregational executive board;
>
> 6. Abbot and monastery brotherhood."

Article 12 of the Constitution of the Mother Church provides:

> "The Servian Orthodox Church is episcopal. Its main administrative division is composed of dioceses, both in regard to Church hierarchical and church administrative aspects."

Article 13 of the Mother Church Constitution provides:

> "At the head of the Serbian Orthodox Church is the Serbian Patriarch, as its chief ruler. . . .
>
> "At the head of each diocese there is a diocesan bishop as its direct rules. [sic] He is, according to the church canonical regulations, chief representative and guiding leader of all church spiritual life and church order in the diocese and he rules the diocese assisted by his clergy and laymen."

Article 14 of the Mother Church's Constitution enumerates the dioceses located within the territory of

Yugoslavia while Article 15 enumerates the dioceses located outside the geographical confines of Yugoslavia. Among the dioceses outside Yugoslavia is included the religious body in this country. The only distinction between dioceses within and without Yugoslavia is in administration. The dioceses located outside Yugoslavia have internal administrative autonomy; however, they are hierarchically and sacramentally (canonically) an integral part of the Mother Church. Article 16 of the constitution of the Mother Church authorizes the Holy Assembly to establish, liquidate, or reorganize dioceses.

Article 30 of the Mother Church Constitution provides:

> "The founding of new monasteries, as well as the merging of existing ones, is performed by the Diocesan Bishop, and he informs the Holy Synod of Bishops which grants the final approval."

• • •

Article 64 of the Mother Church Constitution provides:

> "All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church are valid and final."

Article 2 of the Bylaws of the local congregation states:

> "The Serbian Orthodox Church and School Parish of St. Peter and St. Paul, as [sic] a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada and as such upholds all of the church canon laws and other laws of the church, according to the head of the diocese, who is the Bishop, or his assistants."

We conclude that the relationship between the local church, United States and Canada Diocese and the Mother

Church was based on a hierarchical structure within the meaning of *Watson v. Jones* and *Kedroff*, supra. Our decision that we are here dealing with a hierarchical church is bolstered by the decisions of courts in other jurisdictions dealing with the same question. See Serbian Orthodox Diocese v. Ockoljich, 711 Ill. 244, 219 N.E. 2d 343 (1966); *Serbian Eastern Orthodox Congregation of "St. George" v. Serbian Eastern Orthodox Diocese for Eastern States of America and Canada*, 106 N.J. Super. 22,254 A.2d 119 (1969), cert. den. 397 U.S. 961, rehearing den. 397 U.S. 1058 (1970); and *Serbian Orthodox Church Congregation of St. Demetrius v. Kelemen*, 21 Ohio St. 2d 154, 256 N.E. 2d 212 (1970). For this same interpretation in a similar religious organization, see *St. Michael & Archangel Russian Orthodox Greek Catholic Church v. Uhniat*, 436 Pa. 222, 259 A. 2d 862 (1969), cert den. 400 U.S. 823, reh. den. 400 U.S. 930 (1971); *Macedono-Bulgarian Orthodox Church v. Macedonian Patriotic Organization*, 27 Mich. App. 713, 184 N.W. 2d 233 (1970). In *Dragelevich v. Rajsich*, 24 Ohio App. 2d 59, 263 N.E. 2d 778 (1970), which wasn't cited by either party here, the court stated: "Our conclusion is that the creation or alteration of the diocese having supervision over this parish church and the appointment or removal of either the bishop presiding over the appropriate diocese or parish priest assigned to this church are matters of church government and constitutionally protected from state interference in the absence of any proof that the exercise of such powers was either fraudulent, collusive or arbitrary."

We must next turn our attention to the central issue in this case: Whether the trial court transgressed the First Amendment in deciding that the Mother Church's act in dividing the United States and Canada dioceses was null and void.

All concede that any remedy for the defrocking of Dionisije is not to be found in the civil courts and the trial court explicitly excluded any consideration of this issue.

The proper First Amendment touchstones have been set forth by the Supreme Court of the United States in a line of cases commencing with *Watson v. Jones* decided a century ago. The principles and limitations for review of church property disputes found in *Watson v. Jones* were elevated to constitutional status in *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 83 S. Ct. 143, 97 L. Ed. 120 (1957) and *Kreshik v. St. Nicholas Cathedral,* 363 U.S. 190 (1960). These were more broadly stated in *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969). The last word from the Supreme Court of the United States and perhaps the best synthesis of these principles is found in *Maryland and Virginia Elder of Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367 (1970), in which Mr. Justice Brennan, the author of the court's opinion in the *Hull Memorial* case, stated in concurring opinion:

> "We held in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449, 89 S. Ct. 601, 606, 21 L. Ed. 2d 658 (1969), that 'First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely eccelesiastical concern. * * * [T]he [First] Amendment therefore commands civil courts to decide church property

disputes without resolving underlying controversies over religious doctrine.' It follows that a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenents of faith.

Thus the States may adopt the approach of *Watson v. Jones,* 13 Wall. 679, 20 L. Ed. 666 (1872), and enforce the property decisions made within a church of congregational polity 'by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government,' id., at 724 and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue, unless 'express terms' in the 'instrument by which the property is held' condition the property's use or control in a specified manner. Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to control the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the Watson approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.

> '[N]eutral principles of law, developed for use in all property disputes,' *Presbyterian Church supra,* 393 U.S. 440 at 449, 89 S. Ct. at 606, provide another means for resolving litigation over religious property. Under the 'formal title' doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues. For example, provisions in deeds or in denomination's constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced." (footnotes omitted)

One additional decision must be mentioned. In *Gonzalez v. Archbishop of the Philippines,* 280 U.S. 1 (1929), Mr. Justice Brandeis stated: "In the absence of fraud, collusion, or arbitrariness, the decision of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before secular courts as conclusive. . . ." This area of determination was expressly retained in *Hull Memorial* case. However, in this case there was no contention in the trial court by any of the parties relating to fraud, collusion or arbitrariness.

Our Indiana Supreme Court has had the occasion to apply the *Hull Memorial* case in *Smart v. Indiana Yearly Conference of Wesleyan Methodist Church,* —— Ind. ——, 271 N.E. 2d 713, 715 (1971), in which Judge Givan, speaking for the court, stated:

> "It is appellants' position that the appellee conference paid nothing whatever for the real estate in question and that the appellee therefore relies solely on the discipline of the church to sustain its ownership of the land. Appellants thus reason that the judgment in favor of the appellee by the trial court was in viola-

tion of the principle of law laid down in *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterial Church* (1969), 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 and *Merryman v. Price* (1970), Ind., 259 N.E. 2d 883, 22 Ind. Dec. 62. [cert. den. 92 S. Ct. 890 (1971)]

In reality it is the appellants who are relying on the discipline of the church in their attempt to establish an equitable ownership of the real estate in question. The appellee has demonstrated its ownership of the property, subject only to the possibility of an equitable trust established for the benefit of another. The appellants attempt to make their case of an equitable trust by turning to the discipline of the church. As pointed out in the *Presbyterian Church* case, supra, and the *Merryman* case, supra, the civil courts will not pass upon matters of ecclesiastical discipline.

We would observe that Justice Harlan in his concurring opinion in the Presbyterian Church case correctly observes that civil courts can enforce conditional trusts if the fulfillment of the condition can be immediately ascertained without determining ecclesiastical questions."

A key sentence in the *Hull Memorial* case is "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." 89 S. Ct. at page 606.

This causes us to consider what is religious doctrine and practice. From the facts in the *Hull Memorial* case we can find a strong limitation on the civil courts in determining questions of departure from doctrine as it relates to implied trusts. Just exactly what other basis is available to a civil court from which it might find an implied trust to exist in a church property dispute is left open. In *Sharpsburg* there is a strong suggestion that such

an implied turst may not be found to exist if the resolution of the question requires consideration of doctrinal questions and an extensive inquiry into religious polity. We are not here required to decide whether the implied trust theory can be used since we reach our decision without regard to it.

The religious rites, doctrines, polity and practices of a church certainly contain as an essential part beliefs and practices in regard to the ownership of property. These beliefs are primarily religious and not secular. Frequently these beliefs are as strongly held *as religious beliefs* in regard to baptism or the sacraments. In other words, *beliefs* as to the proper method for a church to own property are frequently bound up with and intermingled in the religious rites, doctrines, polity and practices of the church.

In this case the parts of the constitution of the Mother Church and the United States and Canada Diocese relating to the ownership of property are clearly interspersed and interrelated with the other provisions relating to religious rites, doctrines, polity and practices. A cursory examination of these two constitutions clearly demonstrate that they are basically religious and not secular documents. The civil courts have been admonished to exercise great self-restraint in attempting to interpret disputes arising under such religious documents. The *Hull Memorial* and *Sharpsburg* cases frame this self-restraint in terms of First Amendment values. The civil courts may make a limited examination of religious instruments to determine the nature of the particular church organization within the meaning of *Watson v. Jones* and *Kedroff*. The civil courts tread on constitutionally impermissible grounds when they attempt to interpret the rights of parties under

such religious documents. To paraphrase Mr. Justice Frankfurter in another contest, the civil courts should and must restrain themselves from involvement in an ecclesiastical thicket. The difficulties and dangers inherent in a civil court attempting to sort out what part of a church's rights, doctrines, polity and practices represent religious doctrine and what do not are well outlined in 75 Harvard L. Rev. 1142-1186 (1962).

In this case the trial court clearly went beyond the limits of the First Amendment in deciding that the Mother Church was without authority to divide the United States and Canada Diocese and create the three new dioceses. In reaching its decision the trial court had to probe deeply into the allocations of power within the church so as to decide where the religious law places control over the use of church property.

It is helpful to consider how the courts in other jurisdictions have considered this same question. In *Serbian Eastern Orthodox Church Congregation v. Serbian Eastern Orthodox Congregation*, 254 A. 2d 122, a case involving the same dispute as here, the court states:

> "... under the *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church* we may not on this appeal review the validity of the action of the Holy Assembly of Bishops, acting under the authority of article 16 of the constitution of the mother church, in subdividing the old diocese, and appellants make it clear in their reply brief that they are not seeking such review. Further, assuming, as the court there pointed out, that a narrow review of a specific ecclesiastical decision would be permissible under *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 50 S. Ct. 5, 74 L. Ed. 131 (1929), to determine whether fraud, collusion or arbitrariness appeared, the proofs here are entirely deficient in that respect."

The factual and procedural development of the decision of the Ohio Supreme Court in the *Kelemen* case, supra, is also pertinent. That case involved the congregation at Akron, Ohio, which was involved in a dispute similar to the one here. The Ohio Appellate Court found that the Mother Church did not have the right, without the consent of the diocese, to reorganize or change the territory of the diocese. The Supreme Court of Ohio affirmed and a petition for a writ of certiorari was filed in the Supreme Court of the United States. On February 24, 1969, the Supreme Court of the United States granted a writ of certiorari, vacated the judgment and remanded the case to the Supreme Court for further consideration in light of the *Hull Memorial* case. See 89 S. Ct. 849 (1969). On remand, the Supreme Court of Ohio, 256 N.E. 2d at page 216, stated:

> "Briefly stated, our inquiry is: Did the Court of Appeals base its judgment, awarding possession and control of the property involved, upon consideration of whether the parties had adhered to or departed from church tenets and doctrine, or did it base its judgment upon principles of neutral law?
>
> The answer lies in the appraisal of the findings of that court. The Court of Appeals' factual findings regarding the name, incorporation, the hierarchical form of organization, and plaintiff's claim of autonomy from the Mother Church did not require a decision involving church doctrine or tenets.
>
> That court arrived at legal conclusions relative to the organizational relationship, powers and duties of the Mother Church concerning the appointment of a bishop for the Diocese of the United States and Canada, and the Mother Church's attempt to eliminate the diocese. While we recognize that these matters of internal church organization are chronic sources of disagreement for the parties and are frequently

mentioned in the pleadings, briefs and arguments, the findings of the Court of Appeals are unnecessary and immaterial to a neutral law inquiry utilizing principles of law developed for use in all property disputes. Further, the *Hull Memorial* case offers the strong suggestion that civil courts cannot constitutionally determine matters of church government. In that case, the court's opinion cites with approval *Kedroff v. St. Nicholas Cathedral of Russian Orthodox, Church in North America,* 344 U.S. 94, at page 116, 73 S. Ct. 143, at pages 154-155, 97 L. Ed. 120, • • •

In addition, the Court of Appeals found that the members of plaintiff association have performed schismatic acts amounting to a withdrawal from the general church. The essence of this finding must lie in a judicial determination that plaintiff has acted contra to the doctrine and tenets of the church. In order to make such a finding the Court of Appeals had to examine plaintiff's activity as well as church doctrine and tents. The *Hull Memorial* case, supra, held that a jury could not make such examination, and the viability of the principle of the *Hull Memorial* case commands the same judicial abstinence in the instance case.

• • •

In the case at bar, we are not confronted with the problem of whether we can constitutionally order the enforcement of a determination made by an ecclesiastical tribunal. Other than the order creating the three new dioceses, the record fails to indicate an ecclesiastical tribunal's determination concerning the power of the Mother Church to eliminate the American-Canadian Diocese. The record does not illustrate the plaintiff has been ecclesiastically adjudicated to be outside the church doctrine because of the commission of certain acts. Additionally, the determination of the status of Bishop Dionisije, who was ecclesiastically adjudged defrocked, is frequently mentioned but remains unnecessary to our inquiry.

> Any question concerning court enforcibility of such a church determination is not before us.
>
> All the agonies of a church controversy are discernible from a review of this case, but we are convinced by the rule of the *Hull Memorial* case that the civil court's role as a tribunal to bring order to church controveries is narrowly limited."

Thereafter, the Supreme Court of the United States denied certiorari, 400 U.S. 827 (1970).

It is unfortunate that the trial court did not have the *Hull Memorial, Sharpsburg, Kelemen, Serbian Eastern Orthodox Congregational* (N.J.), *Smart* and *Merryman v. Price* cases before it when it entered its findings and judgment in 1968.

The Appellees rely strongly on the *Serbian Orthodox Diocese v. Ocokoljich,* supra, which was decided before the *Hull Memorial* opinion in 1969 and *Sharpsburg* opinion in 1970. In *Ocokoljich* there was a basic finding that the Mother Church involved was hierarchical. With this we agree. Beyond this the Appellate Court of Illinois became involved in a civil determination of the allocation of power within the church. In doing so they went beyond the outer limits prescribed in *Hull Memorial* and *Sharpsburg.*

The documentary evidence in this case discloses that the local church in South Bend was organized as a church within the hierarchy of the Mother Church and therefore those who remain loyal to the Mother Church are entitled to control and use of the property in question.

We do not deem it necessary to do so, but the same result could be reached, which we reach here, under the so-called formal title approach mentioned in the *Sharpsburg, Kelemen, Merryman v. Price,* and *Dragelevich* cases. In this case neither the trial court nor this court are asked or

required to determine the title to real estate. An injunction was sought to determine the right to control and use the property in question. The injunction was granted on a constitutionally impermissible basis and therefore cannot stand. This controversy has been thoroughly aired and we can see no basis for permitting a new trial in this case.

Therefore, this case is reversed and remanded with instruction to set aside and dissolve the injunction heretofore entered and to enter judgment for the Appellants denying relief on the Appellees' complaint for injunction.

Reversed and remanded.

Hoffman, C. J. and Staton, J. concur.

DENIAL OF PETITION FOR REHEARING
(August 11, 1972)

You are hereby notified that the Court of Appeals has on this day Denied Appellee's petition for rehearing. Allen Sharp, Acting Chief Justice. Chief Justice Hoffman dissents with Opinion.

ON PETITION FOR REHEARING

HOFFMAN, CHIEF JUDGE.

I would grant appellees' petition for rehearing filed herein.

Although I agree with the result reached in the opinion previously handed down (*Draskovich v. Pasalich* (1972), 280 N.E. 2d 69), I am not in full accord with the reasoning therein.

After further research and a study of the briefs, the case of *Serbian Orth. Ch. Cong. of St. Demetrius v. Kelemen* (1970), 21 Ohio St. 2d 154, 256 N.E. 2d 212, should be used as a guide in reaching a proper result wherein the court stated:

> "The control of the name and property, of the Serbian Orthodox Church Congregation of St. Demetrius of Akron, Ohio, must be determined only by reference to the provisions of the Code of Regulations and By-Laws of the corporation not for profit, the corporate laws of this state, and any other secular instruments not requiring the resolution of religious tenets or doctrine."

Following that guide the church properties in the case at bar should be subject to the control of the voting members of the church and the majority decision of such members should have the control and use of the church properties.

Ruling of the Supreme Court on Petition to Transfer.

IN THE

SUPREME COURT OF INDIANA

(On Petition to Transfer From The Court of Appeals of Indiana)

Nick Draskovich, Et Al.,	)	
	)	Court of Appeals
vs.	)	No. 172 A 13
	)	Appeal From The
Novak Pasalich, Et Al.,	)	Elkhart Circuit Court
	)	

Plaintiff—Appellees Petition to transfer is hereby DENIED this 7th day of May, 1973.

N. F. Arterburn
Chief Justice

Hunter, J. dissents

IN THE CIRCUIT COURT OF
LAKE COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

The Serbian Eastern Orthodox Diocese For the United States of America and Canada, a religious body, et al., *Plaintiffs,*		FILED APR 30 73
vs.		No. 63-1644 Consolidated
Dionisije Milivojevich, et al., *Defendants.*	No. 63-2312	

FINAL DECREE

This consolidated cause having come on to be heard for the entry of a Final Decree the Court having filed its Memorandum Decision on December 28, 1972, and having heard the statements of counsel for the parties made in open court and being otherwise fully advised in the premises, finds and concludes as follows:

1. The plaintiffs are the Serbian Eastern Orthodox Diocese for the United States of America and Canada a religious body duly organized and existing since 1921; Bishop Firmilian Ocokoljich, a Serbian cleric (hereinafter referred to as "Bishop Firmilian"); Bishop Sava Vukovich, a Serbian cleric; Bishop Gregory Udicki, a Serbian cleric; and certain representative individuals, both laymen

(Emil Droback, Sam Milanovich and Donald Kral) and Clerics (Very Reverend Dusan Popovich, Very Reverend Dusan Klipa and Very Reverend Vladimir Mrvichin), who sue on their own behalf and on behalf of those persons, lay and clerical, who recognize and adhere to ecclesiastical and hierarchical allegiance to the Serbian Orthodox Church whose Patriarchal See is located in Belgrade, Yugoslavia, which church is one of fourteen recognized orthodox ecclesiastical and hierarchical churches in the world and is hereinafter referred to as the "Serbian Church."

2. The defendants are Dionisije Milivojevich (hereinafter referred to as "Dionisije"), a former Bishop of the Serbian Church, a former diocesan bishop and officer and agent of the Serbian Eastern Orthodox Diocese for the United States of America and Canada; the Serbian Eastern Orthodox Diocese of the United States of America and Canada, an Illinois religious corporation organized and existing since 1935 under the Illinois Religious Corporations Act (hereinafter referred to as the "Illinois religious corporation"); and, the Serbian Orthodox Monastery of St. Sava, an Illinois not-for-profit corporation organized and existing since 1945 under the Illinois Not-for-Profit Corporations Act (hereinafter referred to as the "Illinois not-for-profit corporation").

3. The Serbian Church is an ancient, world-wide, hierarchically organized church. Under the Serbian Church's hierarchical organization, the geographical territories throughout the world over which it assumes ecclesiastical authority and administration are designated, fixed and determined by the Church's Holy Assembly of Bishops and thereafter designated and set forth in its Constitution and each is designated a diocese of the Serbian Church; subject, however, to the provisions in the Constitution of

the Serbian Church and the provisions in the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada, reserving to the latter said Diocese full administrative freedom in all administrative aspects.

4. The sole power and authority to elect, ordain and assign a Diocesan Bishop rests in the Serbian Church's Holy Assembly of Bishops. Each Diocesan Bishop is, by virtue of his office as Diocesan Bishop, a member of the Holy Assembly of Bishops (hereinafter referred to as the "Holy Assembly"), the Serbian Church's highest hierarchical judicatory. At the head of the Holy Assembly is one of its number who is designated as Patriarch (the first among equals), who is elected to his office as Patriarch by the Holy Assembly and serves as its President. The executive branch of the Holy Assembly is the Holy Synod. It consists of the Patriarch and four other Diocesan Bishops selected by the Holy Assembly.

5. Neither the Illinois religious corporation nor its members have, nor have they or any of them ever had, the authority to elect, ordain, assign, reject or accept bishops. Any cleric purportedly elected to the office and rank of Bishop of the Serbian Church by any persons, groups or corporations or other entities other than the Holy Assembly were not and are not validly elected to the office and rank of Bishop, their election was and is in each instance null and void. No one of them is or has ever has been a Bishop of the Serbian Church.

6. The Serbian Eastern Orthodox Diocese for the United States of America and Canada was created by the Holy Assembly in the early 1920's. Initially, Archimandrite Mardary was assigned to administer the affairs of the newly created diocese. On November 22, 1925, Mardary

was elected by the Holy Assembly as Diocesan Bishop for the diocese of the United States of America and Canada. Prior to his death Bishop Mardary caused the Illinois corporation to be formed. It was organized on May 10, 1935 pursuant to the Illinois Religious Corporations Act, ch. 32 pars. 46(a)-(k). It has the powers and obligations as are set forth and defined in the Diocesan Constitution, the Constitution of the Serbian Church and the Illinois Religious Corporations Act, as amended (Ill. Rev. Stats. 1971, pars. 176-187).

7. All assets, real, personal, tangible and intangible transferred by the Illinois religious corporation (and all those acting under and pursuant to its authority), were so transferred to the aforedescribed Illinois not-for-profit corporation, Shadeland Corporation and Jackson Corporation subject to, and impressed with, the trust imposed upon those assets. Those assets and all accretions and additions thereby to increase in value, income, earnings, or otherwise have at all times pertinent hereto been held (and are now, and must continue to be held) for the use and benefits of those persons in the United States and Canada faithful to the Serbian Church and to the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

8. Dionisije was elected by the Holy Assembly in Belgrade, Yugoslavia, as Diocesan Bishop for the Serbian Eastern Orthodox Diocese for the United States of America and Canada in December, 1939. By virtue thereof he became and until suspended on May 10, 1963, served as the chief executive officer of the Illinois religious corporation, the Illinois not-for-profit corporation, the Priests' Pension Fund, the Shadeland Corporation, the Jackson Corporation, and the Diocesan Council. The Illinois religious corporation, the Illinois not-for-profit corporation, the

Shadeland Corporation, the Jackson Corporation, and the Priests' Pension Fund, are secular arms of the Serbian Eastern Orthodox Diocese for the United States of America and Canada. The Diocesan Council is the governing body of the Diocese for the United States of America and Canada.

9. On May 10, 1963 the Holy Synod suspended Dionisije. On July 27, 1963, the Holy Assembly removed and deposed Dionisije as Diocesan Bishop and on March 5, 1964, it defrocked him. These actions were valid, free and voluntary, binding ecclesiastical actions of the Holy Synod and Holy Assembly of the Serbian Church, taken wholly within their ecclesiastical power and authority. They were in no respect tainted with fraud, collusion, duress, or arbitrariness. Accordingly, they must be (and should have been) honored and accepted by defendants, and each of them, and, as well, given full force and effect by this and other secular courts of, and in, the United States and Canada, with regard to their effect, ecclesiastically and otherwise, on the possession, control and administration of church property.

10. Dionisije, having been validily suspended on May 10, 1963, and deposed and removed from his position as Diocesan Bishop for the Diocese of the United States of America and Canada on July 27, 1963, and defrocked as a Bishop of the Serbian Church on March 5, 1964, was without power or authority from and after May 10, 1963 to act as, or to exercise any of the rights, privileges, duties, powers or authorities, dejure or defacto, of Bishop of the Diocese. From and after July 27, 1963, the office of Bishop of the Diocese for the United States of America and Canada became and remained and still is vacant, as did and are the offices of chief executive officer of the

Illinois religious corporation, the Illinois not-for-profit corporation, the Priests' Pension Fund, the Jackson Corporation, the Shadeland Corporation and the Chairmanship of the Diocesan Council, as well as other offices and positions of the Diocese and of each of the above-listed corporations, held by the Bishop of the Diocese by virtue of his office as Bishop.

11. The office of Bishop for the Diocese of the United States of America and Canada being vacant, the Holy Assembly had exclusive authority to fill that vacancy. Upon the entry of the order of suspension and pending the final disposition of the suspension of Dionisje and his ultimate reassignment to his office or his removal therefrom by the Holy Assembly, the Holy Synod had exclusive authority to appoint an Administrator of that Diocese of the United States of America and Canada.

12. The Holy Synod, following Dionisije's suspension, validly appointed Bishop Firmilian as Administrator for the Diocese of the United States of America and Canada on May 10, 1963. By virtue of that appointment, Bishop Firmilian has since then been, and is, pending the election of a Diocesan Bishop to succeed him, the chief executive officer of the Illinois religious corporation, the Illinois not-for-profit corporation, the Priests, Pension Fund, and the Diocesan Council, responsible for the administration for the benefit of, and as trustee for those who are members of and who are faithful and who give allegiance to the Serbian Church and the Serbian Eastern Orthodox Diocese for the United States of America and Canada, of all of the assets tangible and intangible, real and personal, owned, held, controlled and operated by each of the aforedescribed entities. As Administrator, he has, and has had since his appointment on May 10, 1963, the powers, author-

ities, rights, duties, privileges, emoluments, immunities, offices and positions of the Administrator of the Diocese of the United States of America and Canada with the powers and subject to the limitations contained in the Constitutions of the Serbian Church and of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

13. Dionisije and those acting under his control and authority, have since May 10, 1963, illegally and improperly refused to recognize:

(i) the decisions of the Holy Assembly suspending, removing and defrocking Dionisije, and

(ii) the authority of Bishop Firmilian as Administrator for the Serbian Eastern Orthodox Diocese for the United States of America and Canada and as such, the holder of all offices and positions, rights, duties, powers, authorities, emoluments, immunities of Administrator, including, among others, the chief executive officership of the Illinois religious corporation, the Illinois not-for-profit corporation, the Priests' Pension Fund, and the Diocesan Council.

14. Bishop Firmilian's authority as Administrator of the Diocese for the United States of America and Canada is as set forth in the Constitutions of the Serbian Church and the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

15. The Illinois religious corporation has full administrative freedom with relation to possession, use and control of its real and personal property, tangible and intangible, provided, however,

(i) that it may not change or amend the Diocesan Constitution without the approval of the Holy Assembly,

(ii) that all said real and personal property, tangible and intangible, has been during all times pertinent hereto, and still is and will remain, property held in trust to be administered for the benefit of those faithful in the United States and Canada who are faithful to the Serbian Church, and the Serbian Eastern Orthodox Diocese for the United States of America and Canada; and

(iii) the Illinois religious, Shadeland and Jackson Corporations and the Priests' Pension Fund may not employ any of their property contrary to the trust imposed thereon.

16. The changes and amendment to the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada purportedly enacted subsequent to May 10, 1963, not having been approved by the Holy Assembly are null and void and without any force or effect, defacto or dejure.

17. By virtue of the authority conferred upon it by the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada, the Diocesan Council has apparently managed all the temporal affairs of the Serbian Eastern Orthodox Diocese from May 10, 1963 to the present and there has been no evidence presented to this Court of any breach of the trust imposed upon the assets, or wrongdoing, with the assets of the Illinois religious corporation or Illinois not-for-profit corporation since May 10, 1963. The Court further finds that the financial and administrative matters conducted

by the Sabors since May 10, 1963 have apparently been in accordance with the Constitution of the Serbian Eastern Orthodox Diocese except to the extent that the Sabors purported to amend the Diocesan Constitution without the approval of the Holy Assembly of Bishops.

18. Absent the calling and holding of a Sabor pursuant to the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada and appropriate actions of the Sabor, it was improper for the Holy Assembly to initiate or affect a division of reorganization of the entire Diocese for the United States of America and Canada and of the Illinois religious corporation into three new dioceses and, therefore the action of the Holy Assembly purporting to reorganize and divide the Serbian Eastern Orthodox Diocese into three new dioceses and to appoint a Diocesan Bishop of each of the new dioceses is invalid, null and void and of no force or effect, dejure or defacto.

19. Bishop Firmilian in his capacity as the Administrator of the Serbian Eastern Orthodox Diocese for the United States of America and Canada is authorized to do those acts permitted under the Serbian Church Constitution and the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada and may undertake no action inconsistent with this decree or those Constitutions.

20. All Serbian Church congregations in the United States of America and Canada who profess loyalty to the Serbian Church with its Patriarchal See located in Belgrade, Yugoslavia, and the Serbian Eastern Orthodox Diocese for the United States of America and Canada with its Diocesan See located in Libertyville, Illinois, are members of the Serbian Eastern Orthodox Diocese for the

United States of America and Canada regardless of what position said churches may have taken with regard to the Serbian Church and the aforesaid Diocese from May 10, 1963 until the date of the entry of this Decree.

In view of the within and foregoing gindings and conclusions:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The decisions and actions of the Holy Assembly and the Holy Synod relating to the suspension, removal and defrockment of Dionisije were in no way tainted with fraud, collusion, duress, undue influence or arbitrariness. They were in all instances voluntary and legally authorized actions and they are valid, authorized and proper ecclesiastical decisions of the highest judicatories of the Serbian Church, and are in all respects binding upon this Court.

2. Bishop Firmilian was validly appointed by the Holy Synod to be and has been since his appointment on May 10, 1963 the Administrator of the Diocese for the United States of America and Canada in replacement of Dionisije. Until replaced by a Diocesan Bishop elected and assigned by the Holy Assembly, Bishop Firmilian possesses the authority, rights, duties, emoluments, privileges, immunities, offices and positions which are more particularly set forth in the Constitutions of both the Serbian Church and of the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

3. The office of Bishop of the Serbian Eastern Orthodox Diocese for the United States of America and Canada is now and has been since July 27 1963 vacant. The Holy Assembly has the exclusive authority to fill that vacancy.

4. Defendants, and each of them, and all persons, firms, corporations and entities who have acted or who are acting under, with, or pursuant to their order or direction or in concert with them, are ordered to recognize Bishop Firmilian as the Administrator of the Serbian Eastern Orthodox Diocese for the United States of America and Canada and his authority as is set forth in the Constitutions of the Serbian Church and the Serbian Eastern Orthodox Diocese for the United States of America and Canada.

5. The Illinois religious corporation, has full administrative freedom within the entire political territory of the United States of America and Canada and it may independently regulate and rule the activities of its churches, schools and other diocesan institutions subject to the trusts hereinbefore set forth, and the Serbian Church with its See in Belgrade, Yugoslavia, other than having the power to approve or disapprove amendments to the Constitution of the Serbian Eastern Orthodox Diocese of the United States of America and Canada has no right or authority to interfere with the management of the property of the Serbian Eastern Orthodox Diocese.

6. Any purported changes or amendment to the Constitution of the Serbian Eastern Orthodox Diocese for the United States of America and Canada purportedly enacted subsequent to May 10, 1963 are null and void and do not now nor have they ever had any defacto or dejure force or effect.

7. The May 10, 1963 decision of the Holy Assembly of Bishops dividing the Serbian Eastern Orthodox Diocese for the United States of America and Canada into three new dioceses, was illegal, invalid and unenforceable because it is in violation of the Constitutions of the Serbian Church

and the Serbian Eastern Orthodox Diocese and all acts of the bishops and officers of the three new dioceses as alleged successors to the American-Canadian Diocese are null and void.

8. Dionisije has not been a Bishop of the Serbian Church since March 5, 1964, nor a Bishop of the Serbian Eastern Orthodox Diocese for the United States of America and Canada since July 27, 1963, nor, since May 10, 1963, the chief executive officer of the Illinois religious corporation, the Illinois not-for-profit corporation, the Shadeland Corporation, the Jackson Corporation, the Priests' Pension Fund, or the Diocesan Council, nor has he had authority since May 10, 1963 to exercise any ecclesiastical or administrative authority or power whatever with respect to the property or affairs of said corporations, Cuouncil and Fund or any committee or group associated with them.

9. The Court retains jurisdiction of this cause for the purpose of entering any further orders or decrees necessary, appropriate or desirable in order to execute, inforce and carry out this Decree.

10. The court costs in this consolidated cause shall be calculated by the Clerk of Court, assessed and paid one-half by plaintiffs as a group and one-half by defendants as a group.

11. Nothing shall delay the enforcement or appeal of this decree.

ENTER:

/s/ L. ERIC CAREY

Dated: April 30, 1973.
ENDORSED:
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In the Supreme Court of the United States

OCTOBER TERM, 1973

NOVAK PASALICH, Et Al.,

Petitioners,

vs.

NICK DRASKOVICH, Et Al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-245

NOVAK PASALICH, Et Al.,

Petitioners,

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The caption to Petitioners' Brief sets forth that Nick Draskovich, *et al.*, are the Petitioners and Novak Pasalich, *et al.*, are Respondents. This is incorrect and we have correctly listed the parties in our caption.

REFERENCE TO OPINIONS BELOW

This portion of the Petition omits the letter of opinion by the Judge of the Elkhart Circuit Court. The letter of opinion is set forth in the App. pp. 1-4.

At page 1 of the Petition, Petitioners refer to the denial by the Supreme Court of Indiana of their Petition for Rehearing and of the separate opinion of Judge Hoffman which Petitioners term "a dissenting opinion." It was not. Judge Hoffman, in his separate opinion, states that, "*Although I agree with the result reached in the opinion previously handed down* * * *, I am not in full accord with the reasoning therein." (Emphasis added.) Pet. App. p. 41.

JURISDICTIONAL STATEMENT

This Court has no jurisdiction to review the judgment of the Supreme Court of Indiana denying Petitioners' Petition to Transfer the opinion and decision of the Court of Appeals of Indiana. Petitioners failed to timely and properly raise the "federal" question they allege in their Petition, and the question raised by Petitioners is not a federal question.

Further, the opinion and decision of the Court of Appeals of Indiana carefully analyzed and correctly applied the church cases decided by this Court, and said opinion and decision in no way contravened the First and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

Respondents strongly disagree with the statement of the question presented as set forth in Petitioners' Petition. This statement paraphrases, out of context, a portion of dictum of the opinion of the Court of Appeals of Indiana. See Pet. App. p. 34. It is Respondents' position that the following questions are presented by Petitioners' Petition:

1. Whether the purported federal question sought to be reviewed was timely and properly raised by Petitioners?

2. Whether the question sought to be reviewed is a federal question?

3. Whether the application of *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871) by the Court of Appeals of Indiana in deciding this case, was in violation of the United States Constitution?

4. Whether the Indiana courts would reach a different result by application of "neutral principles of law," if *Watson* were overruled and states were *required* to apply "neutral principles of law"?

STATEMENT OF THE CASE

Petitioners' statement of the case omits relevant facts and Respondents take exception to much of Petitioners' terminology and phraseology.

A. The Hierarchical Structure of the Serbian Eastern Orthodox Church

The Serbian Eastern Orthodox Church is hierarchical in structure and this hierarchy is as follows: The Serbian Patriarch is the supreme head of the church and is elected by the Holy Assembly of Bishops. The Holy Assembly of Bishops (sometimes called the Holy Council of Bishops) is composed of all diocesan bishops and meets under the presidency of the Patriarch, as the highest hierarchical and legislative body of the church. The Holy Synod of Bishops is composed of the Patriarch and four diocesan bishops (elected by the Holy Assembly of Bish-

ops) as members and is the highest executive body of the church. The above-described bodies constitute the Patriarchate and are sometimes referred to as the "Mother Church." Under the Patriarchate as the head of the Serbian Eastern Orthodox Church are, as a part thereof, the dioceses with a diocesan bishop elected by the Holy Assembly at the head of each, and under each diocese are the parishes with their clergy. The local church involved in this controversy is the Serbian Eastern Orthodox Church and School Parish of St. Peter and St. Paul of South Bend, Indiana. It was a part of the Serbian Eastern Orthodox Diocese of the United States of America and Canada, a religious body (Diocese), and the Diocese was one of the dioceses of the Serbian Orthodox Church whose See is in Belgrade, Yugoslavia (Mother Church).

B. The Diocese, Its Reorganization, and the Defrockment of Dionisije

The dioceses of the Serbian Eastern Orthodox Church are geographical areas which are ecclesiastical and administrative units, each of which has one bishop as its head. In 1921 the Holy Assembly of Bishops established the Diocese of the United States and Canada and appointed its first administrator. In accordance with the canons, the constitution of the Mother Church and the Diocesan constitution, all subsequent bishops of the Diocese have been elected by the Holy Assembly and all subsequent administrators have been appointed by the Holy Synod. In 1927 the administrator convened a diocesan assembly which adopted a constitution, which constitution was ratified by the Holy Assembly. All amendments thereto which were adopted, were, as required, approved by the Holy Assembly. In 1935 the bishop of the Diocese (Bishop Mardary) created an Illinois religious corporation under the

name of the Serbian Eastern Orthodox Diocese for the United States of America and Canada for the sole purpose of receiving title to the real estate of the Diocese. The provisions of the Illinois Religious Corporation Act under which the corporation was organized does not permit any independent church corporation, but requires the corporation to be a part of a hierarchical religious organization. This corporation never elected any officers or board of directors, it did not adopt any by-laws and, of course, never adopted a constitution.

The number of parishes within the Diocese grew from about 26 at its inception to about 75 by 1962. The Diocesan Bishop, Dionisije, and its Council, on numerous occasions, requested of the Holy Assembly that the Diocese be reorganized and additional bishops appointed due to its size and the increased number of parishes it served.

The Holy Assembly appointed a delegation in September 1962 to come to the United States to examine and establish the need for two or three additional bishops for the Diocese. The delegation was also given the task of informing Bishop Dionisije of the fact that charges had been filed against him in the Holy Synod based upon accusations made by members of the clergy and laity of his Diocese. These charges alleged, among others, conduct unbecoming to his clerical rank and position, with particular reference to non-performance and negligent performance of official duties and schism.

On May 10, 1963, the Holy Synod ordered the initiation of procedures against Bishop Dionisije and temporarily suspended him from the administration of the Diocese until the charges could be investigated and adjudged. At the same time the Holy Synod appointed Archimandrite Fir-

milian, Dionisije's episcopal deputy, as administrator of the Diocese.

Also, on May 10, 1963, the Holy Assembly reorganized the Diocese into three new dioceses, i.e. the Middle Eastern American and Canadian Diocese, the Middle Western American Diocese (adding thereto the additional territory of South Africa) and the Western American Diocese (adding thereto the additional territories of Central and South America). The authority for this reorganization was based upon the canons and constitution of the Serbian Eastern Orthodox Church. On May 17, 1963, the Holy Synod appointed Archimandrite Firmilian as temporary administrator of the Middle Western American Diocese.

Following the investigation of Dionisije by the Holy Synod, the Holy Assembly, on July 27, 1963, relieved Dionisije of the duties of Diocesan Bishop, declared the Middle Western American Diocese vacant, and elected Archimandrite Firmilian as Diocesan Bishop of the Middle Western American Diocese.

An indictment was filed against Dionisije, trial was held, and on March 5, 1964, the Holy Assembly found Dionisije to be guilty and adjudged that he be defrocked and removed from the roll of the hierarchy of the Serbian Orthodox Church and be returned to the status of layman.

C. Local Parish Vote

In about June, 1963, the South Bend parish received two letters; one letter was from the Mother Church regarding its decisions to reorganize the Diocese and temporarily suspend Bishop Dionisije; and the other letter was from Dionisije stating that he was refusing to recognize these decisions.

On March 1, 1964, the membership of the local parish held a duly-called special meeting at which a motion was

made and carried that a special meeting be held on March 22, 1964, for the purpose of determining by vote whether the parish would adhere to the decisions of the Mother Church in reorganizing the church and suspending Dionisije or whether it would adhere to the views of Dionisije that the Mother Church had no authority to make these decisions.

At the duly-called membership meeting on March 22, 1964, the following resolution was unanimously adopted by a vote of 194 in favor and none voting against:

> "Be it Resolved, that the St. Peter and St. Paul Serbian Orthodox Church membership hereby rejects the resolution dated November 12, 1963, as adopted at the Sabor meeting in Libertyville, Illinois, and therefore, this church shall remain in continued unity, as in the past, with the Holy Synod, Holy Bishops Council and the Patriarch, thus recognizing as the bishop for this diocese the Right Reverend Bishop Firmilijan, as per orders, directives, and decisions of the Holy Bishops Council."

D. Proceedings in Indiana Courts

On August 28, 1964, the seven Petitioners filed an injunctive action against the Board of Trustees of the local parish seeking to prohibit the Board from doing any act which might tend to separate the local parish from the old Diocese.

The trial court unconstitutionally examined and interpreted the constitutions of the Mother Church and of the Diocese for the purpose of determining that the Mother Church was without authority to reorganize the Diocese. See App. pp. 3-5.

Respondents appealed this decision directly to the Supreme Court of Indiana because the Indiana rules in effect

at that time required appeal to the Supreme Court in all cases in which there was presented a question regarding rights guaranteed by the state or federal constitution. In this appeal Respondents took the position, among others, that the decision of the trial court violated the First Amendment to the federal constitution because the court became involved in a consideration of doctrinal and ecclesiastical matters which led to the erroneous decision on the merits that the Mother Church was without authority to reorganize the Diocese and that the property of the local church was to be under the use and control of those who recognized the old Diocese.

Subsequent to the filing of the appeal with the Supreme Court of Indiana and prior to oral argument, the Indiana rules were amended to give the Court of Appeals of Indiana jurisdiction over constitutional questions, and the Supreme Court of Indiana transferred the case to the Court of Appeals of Indiana. The Court of Appeals of Indiana entered an opinion adopting the approach of *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1871) reversing the decision of the trial court and remanding the case to the trial court for entry of judgment in favor of Respondents. Petitioners filed a petition for rehearing with the Court of Appeals of Indiana. The court denied this petition with Judge Hoffman voting to grant the petition and stating that he agreed with the result reached in the opinion but that he would use another approach, namely, "the church properties in the case at bar should be subject to the control of the voting members of the church and the majority decision of such members should have the control and use of the church properties." See Pet. App. p. 42. Petitioners petitioned the Supreme Court of Indiana for transfer of this case, and transfer was denied.

REASONS FOR DENYING THE WRIT

A. Petitioners Failed to Timely Raise the Purported Federal Question

Petitioners raise the purported federal question for the first time in this case in their Petition for Writ of Certiorari. Throughout the trial of this case and as their principal position in the trial court, the Court of Appeals of Indiana and the Indiana Supreme Court, Respondents have contended and argued that the constitutional doctrine of *Watson* v. *Jones* was to be applied in the determination of this case. In the trial of this case Petitioners took the position that *Watson* v. *Jones* was not the law of Indiana and throughout all state proceedings in the trial court, Court of Appeals of Indiana and Indiana Supreme Court, Petitioners contended there were no federal constitutional questions in this case. For example, in their original Brief on appeal, they stated "[a]nalysis shows that there is no constitutional issue in the record in this case." Subsequent to the opinion of the Court of Appeals of Indiana, Petitioners filed with the Court of Appeals a Petition for Rehearing En Banc, a copy of which is included in our App. at pp. 7-12. Under Indiana Rules of Appellate Procedure, the timely filing of a petition for rehearing is a procedural requisite for filing a petition to transfer to the Supreme Court of Indiana and thus obtaining an order from the highest court of the state. Indiana Rules of Procedure, A.P. 11 B. Nowhere in this Petition for Rehearing did Petitioners contend that the decision of the Court of Appeals of Indiana in any way violated the

United States Constitution. They mentioned the Constitution by asserting that the Court of Appeals of Indiana erred in *not* examining the constitutions of the Mother Church and of the Diocese to determine the authority of the Mother Church to reorganize the Diocese and asserted that such an examination would not have violated the First Amendment to the Constitution. This assertion in no way challenged the constitutionality of the opinion of the Court of Appeals of Indiana.

Following the denial of rehearing by the Court of Appeals of Indiana, Petitioners filed a Petition to Transfer with the Supreme Court of Indiana. Indiana Rules of Appellate Procedure provide that a petition to transfer may not raise any new matters not set forth in the petition for rehearing. Indiana Rules of Procedure, A.P. 11 B. The Petition to Transfer contended, among other things, that the Court of Appeals could have examined the constitutions of the Mother Church and the Diocese to determine whether the Mother Church had authority to reorganize the Diocese. Nowhere in their Petition to Transfer do Petitioners assert that the opinion and decision of the Court of Appeals violated the United States Constitution. Rather, Petitioners' complaint and contention was that the Court of Appeals did not extend itself to its constitutional limits in examination of church documents and determination of matters of church government. It is not until the instant Petition that Petitioners contend that the Court of Appeals transgressed into the "forbidden thicket" and that its decision was unconstitutional.

Accordingly, the Supreme Court of the United States does not have jurisdiction to review the judgment on writ of certiorari because the purported federal question was not timely and properly raised.

B. The Question Sought To Be Reviewed by Petitioners Is Not a Federal Question

The basic premise of Petitioners' position is that civil courts have unlimited power to examine the constitution of the Mother Church, the constitution of the Diocese and the by-laws of the local parish for the purpose of determining whether the Mother Church has ecclesiastical or administrative authority to reorganize the Diocese. From this premise they conclude that the failure of the Court of Appeals of Indiana to examine these church documents for this purpose results in an unconstitutional decision. Stated another way, Petitioners' "constitutional" question is not that the Court of Appeals entered the "forbidden thicket" and became involved in constitutionally forbidden ecclesiastical matters, but rather their "constitutional" question is based upon their contention that the Court of Appeals stayed *too far removed* from this "thicket" by refusing to examine the church documents for the purpose urged by Petitioners. This interpretation of the decisions of the United States Supreme Court is totally erroneous. We are unaware of any case, and Petitioners have cited none, which has held that in a church property dispute it is a violation of the Constitution for a court to make a decision without going to the limits which the Constitution permits in examining church documents. To the contrary, this Court has made it crystal clear that there are alternative methods and doctrines which courts may apply in resolving church property disputes, so long as their application does not require inquiry into doctrinal issues.

C. The Court of Appeals of Indiana Properly Applied Watson v. Jones and Subsequent Decisions of this Court

Assuming solely for the sake of argument that this Court should determine that Petitioners have properly and timely raised a federal question, Respondents, without waiving the foregoing jurisdictional issues, will consider in this portion of the Brief the opinion of the Court of Appeals of Indiana.

1. Decisions of the United States Supreme Court

The question regarding the role of civil courts with respect to questions involving church matters has been before this Court numerous times.

In 1871 this Court decided the case of *Watson* v. *Jones* 80 U.S. (13 Wall.) 679 (1871) which is the landmark case in the United States concerning church law. In this case the Court made a basic distinction between churches in which individual parishes are independent and churches with hierarchical organization. In the case of hierarchical churches (such as the Serbian Orthodox Church), the Court held that rulings of the highest church authorities are not subject to review at the suit of individuals or local parishes. This rule was laid down as a means of protecting freedom of religious association, the freedom of churches to adopt and maintain their own policy.

The following is the passage in Justice Miller's opinion establishing the basic distinction between types of churches:

> "The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by con-

siderations applicable to a church established and supported by law as the religion of the state.

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owed no fealty or obligation to any higher authority.

"3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general or ultimate power of control more or less complete in some supreme judicatory over the whole membership of that general organization." *Id.* at 722.

After explaining paragraphs 1 and 2, the opinion discussed the limited jurisdiction of courts in disputes concerning hierarchical churches:

"In this class of cases [the third] we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our systems of laws, and supported by a preponderating weight of judicial authority is, that, *whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.*" (Emphasis added.) *Id.* at 726.

Subsequently, this Court gave constitutional significance to the *Watson* opinion in the cases of *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952) and *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190 (1960). In *Kedroff,* this Court discussed *Watson* at length, noting that the holding therein was based on general common law, and concluded:

> "The opinion radiates, however, a spirit of freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116.

In the recent case of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969), this Court cited and relied upon *Watson.* In this case, the state courts of Georgia had resolved the church property dispute by a jury determination of whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it.

This Court reversed and held:

> "* * * First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs

> of government for essentially religious purposes * * *." *Id.* at 449.

The Court in reaching its decision relied upon and quoted with approval from *Watson*. The Court said "The *Watson* Court * * * point[ed] out that it was wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions." *Id.* at 445. The Court concluded that it was proper for a civil court to adjudicate church property disputes *only* when it can do so without interpreting or weighing church doctrine "but simply by engaging in the narrowest kind of review of a specific church decision—i.e., whether that decision resulted from fraud, collusion, or arbitrariness. Such review does not inject the civil courts into substantive ecclesiastical matters." *Id.* at 451.

The most recent decision of this Court involving a church property dispute is *Maryland and Virginia Eldership of the Churches of God* v. *Sharpsburg*, 396 U.S. 367 (1970). In this case the Court wrote a *per curiam* opinion with Justice Marshall writing a concurring opinion. In the concurring opinion Justice Marshall states:

> "Thus the States may adopt the approach of Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666 (1872), and enforce the property decisions made within a church of congregational polity 'by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government,' *id.*, at 724 *and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue*, unless 'express terms' in the 'instrument by which the property is held' condition the property's use or control in a specified manner. *Under Watson civil courts do not inquire whether the relevant church governing body has power under religious law to con-*

> *trol the property in question. Such a determination, unlike the identification of the governing body, frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine.* Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy. In other words, the use of the *Watson* approach is consonant with the prohibitions of the First Amendment only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity.
>
> "'[N]eutral principles of law, developed for use in all property disputes,' *Presbyterian Church, supra,* 393 U.S. 440 at 449, 89 S. Ct. at 606, provide another means for resolving litigation over religious property. Under the 'formal title' doctrine, civil courts can determine clauses, and general state corporation laws. Again, however, general principles of property law may not be relied upon if their application requires civil courts to resolve doctrinal issues." (Emphasis added.) *Id.* at 368-370.

This Court has clearly stated and held that there are at least three doctrines which civil courts may constitutionally adopt in resolving church property disputes, namely:

1. The *Watson* v. *Jones* approach.

2. The neutral principles of law approach.

3. The approach of application of special state statutes governing church property, which statutes do not permit state inquiry into religious doctrine.

States are free to adopt any one or more of these approaches as their application does not involve courts in constitutionally forbidden ecclesiastical questions.

In this case the application of either *Watson* v. *Jones* or "neutral principles of law" (the third doctrine is not applicable in Indiana) results in a decision for Respondents.

The Court of Appeals of Indiana in applying the doctrine of *Watson* v. *Jones* determined that the Serbian Eastern Orthodox Church was hierarchical within the meaning of *Watson* v. *Jones,* that the local parish was a part of this hierarchy and that the property of the local parish was under the control of those who remained loyal to the Mother Church. The Court further held unconstitutional the determination of the trial court that the Mother Church was without authority to reorganize the Diocese because "[i]n reaching its decision the trial court had to probe deeply into the allocations of power within the church so as to decide where the religious law places control over the use of church property." Pet. App. p. 35. In reaching its decision, the Court of Appeals of Indiana carefully considered and properly applied the church property opinions of this Court and Serbian Church opinions arising out of this same basic fact situation.

It is important to note that Petitioners failed to even mention *Watson* v. *Jones* in their Petition in spite of the fact that it is a landmark case in church property disputes

and embodies the rule of law applied by the Court of Appeals of Indiana in the instant case.

In attacking the decision of the Court of Appeals of Indiana, Petitioners are inconsistent in that on the one hand they argue that the Court of Appeals of Indiana entered the "forbidden thicket" by examining the governing documents and making an initial determination that the Serbian Orthodox Church is hierarchical, while on the other hand they argue that the Court of Appeals erred by not examining and interpreting the several church constitutions to determine the allocation of power within the church structure. The Court of Appeals of Indiana did only what this Court held in *Sharpsburg, supra,* a civil court is permitted to do in identifying the governing body, and, having done so, determining that the decision by the highest church body is controlling with respect to the determination of an ecclesiastical matter, the reorganization of the Diocese.

It is undisputed that the Serbian Eastern Orthodox Church is hierarchical. Petitioners concede this fact and all of the Serbian Church cases arising out of this same basic fact situation have so found. While making this concession, Petitioners cling to the proposition that a civil court can and must study the church documents and construe them as prohibiting the Mother Church from reorganizing the Diocese. While it is unclear, it appears that Petitioners are urging that this is an application of "neutral principles of law." This argument of Petitioners is patently erroneous for at least three reasons. *First,* civil courts are not mandated to apply "neutral principles of law" but may appropriately use *Watson* v. *Jones,* as have the courts in most of the Serbian Church cases, including the Court of Appeals of Indiana in the instant case.

Second, the review and determination sought by Petitioners are in violation of the United States Constitution. *Third*, the application of "neutral principles of law" results in a decision for Respondents and not for Petitioners.

2. Other Serbian Church Decisions

There are a number of Serbian Church cases arising out of the same basic fact situation which have been litigated throughout the United States and Canada and in each case the application of the principle of *stare decisis* would result in a decision for Respondents.

All of these cases have recognized the hierarchical polity of the Serbian Eastern Orthodox Church and most cases have applied the doctrine of *Watson* v. *Jones* and awarded the church property to those persons who adhered to the decisions of the Mother Church.[1]

For example, in the Serbian Church case of *Serbian Orth. Cong of "St. George"* v. *Serbian East. Orth. Cong.*, 254 A.2d 119 (N.J. Sup., 1969) *cert. den.* 397 U.S. 961,

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[1]A final judgment was entered by the Supreme Court of Ontario in the case of *Mirkovich, et al. v. Bozanich, et al.* This case is unreported. We have reproduced the judgment and reasons for judgment in our Appendix at pp. 13-35 and have filed a certified copy thereof with the Clerk of this Court.

The Supreme Court of Ontario quoted extensively from *Watson* v. *Jones* and applied *Watson* in awarding the use of the land to those persons honoring the decisions of the Mother Church.

reh. den. 397 U.S. 1058 (1970) the New Jersey Superior Court held as follows:

> "Appellants take the stand that they remain members of the Serbian Orthodox Church, although not following it in the matters here involved. That church is an autocephalous hierarchical one which functions under the spiritual guidance of its Patriarch. Its highest body is the Holy Assembly of Bishops, upon whom rests the power to appoint and remove bishops. *The Holy Assembly which had appointed Bishop Dionisije has removed him as bishop and solemnly declared him to be no longer an Orthodox clergyman. We are assured by appellants that they do not ask us to review that action and we recognize that we may not do so.*" (Emphasis added.) *Presbyterian Church* v. *Hull Church, supra; Watson* v. *Jones, supra; Kreshik* v. *St. Nicholas Cathedral* (1960) 363 U. S. 190, 4 L. Ed. 2d 1140, 80 S. Ct. 1037 * * * *Id.* at 121.
>
> * * *
>
> "*Thus it would appear that the basic conclusions of the trial judge rest, not upon his determination of ecclesiastical questions whose determination by the courts may be inhibited by Presbyterian Church* v. *Hull Church or Watson* v. *Jones, but upon the recognition of decisions made by the highest authority of the mother church of which the Church of St. George was a constituent part from the time of its organization.* The resultant judgment leaves intact the congregation's constitution and by-laws, as they existed prior to the amendment excluding those not recognizing the old diocese. Since the constitution of the old diocese has been carried over into the new diocese, the relations between St. George's and the new diocese, and between the latter and the mother church, remain the same. (Emphasis added.) *Id.* at 122.

Further, many of these cases recognize and have held that civil courts may not constitutionally delve into the ec-

clesiastical question of the authority of the Mother Church to reorganize the Diocese.

Two of the Serbian Church cases speak directly to this point.

Serbian East. Orth. Cong. of "St. George" v. *Serbian East. Orth. Cong. supra,* held:

> "Likewise, under Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church we may not on this appeal review the validity of the action of the Holy Assembly of Bishops, acting under the authority of article 16 of the constitution of the mother church, in subdividing the old diocese * * *" *Id.* at 122.

Likewise, the Supreme Court of Ohio, in *Serbian Orth. Ch. Cong. of St. Demetrius* v. *Kelemen,* 256 N.E. 2d 212 (1970) in applying *Presbyterian Church in United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969) held that the *Hull Memorial* case "offers the strong suggestion that civil courts cannot constitutionally determine matters of church government," *id.* at 216, and the court then found that the reorganization of the U.S. and Canada Diocese by the Mother Church was a matter of church government.

The above language in these two cases is clearly correct and mandated by this Court. Under the authority of *Watson* v. *Jones, supra,* and subsequent decisions of this Court applying *Watson,* "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them in their application to the case before them." *Watson* v. *Jones, supra,* 80 U.S. (13 Wall.) at 726.

And as stated in *Sharpsburg, supra,* 396 U.S. at 369: "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."

Petitioners cite as authority for their position the pending case of *Serbian Eastern Orthodox Diocese* v. *Ocokoljich,* 72 Ill. App. 2d 444, 219 N.E. 2d 343 (1966) and they print in the App. to their Petition the trial court decision on remand. This case stands alone at present, among the Serbian Church cases, in its determination that the Mother Church was without authority to reorganize the Diocese. We strongly disagree with this determination as an unconstitutional infringement upon religion. While Petitioners cite this case, they cannot rely upon it because its application would result in a decision for Respondents herein, as the court honored the decisions of the Mother Church regarding the defrockment of Dionisije and the appointment of Bishop Firmilian as the administrator of the Diocese. See Pet. App. p. 54. As the decision is adverse to the Dionisije faction (Petitioners herein) they are presently appealing this trial court judgment to the Court of Appeals of Illinois, as are Bishop Firmilian's adherents.

Two of the Serbian Church cases have heretofore been before this Court on petitions for writs of certiorari, namely, the *"St. George"* case, *supra,* from the state of New Jersey and the *Kelemen* case, *supra,* from Ohio. This is most interesting in that the opinion and decision of the *"St. George"* case are almost identical to those of the Court of Appeals of Indiana and we have quoted portions of this opinion which set forth the findings and holding of the court, supra, p. 20. By contrast, the original Court of

Appeals opinion in *Kelemen,* while holding that the church property was to be occupied by those persons who recognized the authority of the Mother Church to appoint a new bishop, made the determination that the Mother Church did not have "the power to unilaterally divide the diocese into several dioceses." *Serbian Orth. Ch. Cong. of St. Demetrius* v. *Kelemen* (Ohio Ct. App., 1967) Slip opinion p. 7. The Supreme Court of Ohio affirmed.

This Court denied a petition for writ of certiorari in *St. George," supra,* 397 U.S. 961, on March 2, 1970. This Court granted a petition for writ of certiorari in *Kelemen, supra,* 393 U.S. 527, on February 24, 1969, vacated the judgment, and remanded the case "to the Supreme Court of Ohio for further consideration in light of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church." Ibid.* On remand, the Ohio Supreme Court reversed the Court of Appeals and remanded the case for further proceedings. 256 N.E. 2d 212 (1970). In reversing, the Ohio Supreme Court stated: "The Court of Appeals' factual findings regarding the name, incorporation, the hierarchical form of organization, and plaintiff's claim of autonomy from the Mother Church did not require a decision involving church doctrine or tenets." *Id.* at 216. However, the Ohio court held that legal conclusions by the Court of Appeals relative to the powers and duties of the Mother Church concerning the appointment of a bishop for the diocese of the United States and Canada and elimination of the diocese required an examination of church doctrine and tenets. On remand to the Court of Appeals of Ohio, it held "the church properties herein are subject to the control of the voting members of the church of St. Demetrius, and along with the majority decision of such members as of the year 1962 will pass the right to

use the name of St. Demetrius." *Serbian Orth. Ch. Cong. of St. Demetrius* v. *Kelemen* (Ohio Ct. App., 1971) Slip opinion p. 14.

This Court denied a petition for writ of certiorari of this case, 400 U.S. 827 (1970).

The opinion by the Court of Appeals of Indiana, of which Petitioners complain, examined church documents for the limited purpose of determining that the Serbian Eastern Orthodox Church is hierarchical in the sense of *Watson* v. *Jones* and awarding use of the church property to the members who adhered to the decisions of the Mother Church. The *"St. George"* decision examined the same church documents for this exact purpose and determination. The opinion of the Court of Appeals of Indiana cites and relies upon the *"St. George"* decision. We submit that this Court has tacitly approved the *"St. George"* opinion by its denial of certiorari, in light of the granting of certiorari in *Kelemen.*

D. The Same Result Would Be Reached in this Case by Application of "Neutral Principles of Law"

Petitioners appear to contend that civil courts may not use *Watson* but are mandated to apply "neutral principles of law." This contention is false. However, assuming *arguendo* the correctness of their position, it avails them nothing because Respondents would still win judgment in this case.

The application of neutral principles of law was the alternate position and argument of Respondents in the Indiana courts. Article 147 of the Diocesan Constitution provides: "The property of the church-school congregation in individual colonies belongs exclusively to the said con-

gregation without diocesan rights to the same * * *." As previously noted, the membership of the local parish voted, by a vote of 194 to none, to remain in continued unity with the Mother Church. This was the basis for the dictum by the Court of Appeals of Indiana that: "We do not deem it necessary to do so, but the same result could be reached, which we reach here, under the so-called formal title approach [also referred to as neutral principles of law] mentioned in the *Sharpsburg, Kelemen, Merryman* v. *Price,* and *Dragelevich* cases." Pet. App. p. 38. This was also the basis for the following statement by Judge Hoffman in his separate opinion to Petitioners' Petition for Rehearing before the Court of Appeals of Indiana: "Although I agree with the result reached in the opinion previously handed down * * *, I am not in full accord with the reasoning therein." Pet. App. p. 41. Judge Hoffman then cites *Kelemen, supra,* 256 N.E. 2d 212 and states, "Following that guide the church properties in the case at bar should be subject to the control of the voting members of the church and the majority decision of such members should have the control and use of the church properties." Pet. App. p. 42.

CONCLUSION

We respectfully submit that this Court has no jurisdiction to consider Petitioners' Petition because they failed to timely raise the purported federal question and the question they raise is not federal.

Without waiving the jurisdictional question, Respondents submit the Court of Appeals of Indiana properly based its decision on the *Watson* doctrine, one of the approaches to resolving church property disputes permitted by decisions of this Court.

If this Court should overrule the applicability of *Watson* and mandate the use of "neutral principles of law" in resolving church property disputes, the result in this case would be the same.

For the reasons set forth in this Brief, we ask this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

ELKHART CIRCUIT COURT LETTER OF OPINION

June 6, 1967

Mr. John W. Montgomery
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Mr. Robert K. Rodibaugh
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Mr. Charles W. Ainlay
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Re: #32391, Pasalich, et al vs. Draskovich, et al (and #32541, Pasalich, et al vs. Draskovich, et al, tried under #32391)

Gentlemen:

I have restudied my rather copious notes taken in the trial of this case and the exhibits introduced in evidence. I have also studied the very able and thorough briefs submitted by counsel, as well as the authorities therein cited. Counsel on both sides are to be complimented for the careful and thorough manner in which they conducted the trial of this case and their exhaustive and careful preparation of final

briefs. Attorneys on both sides have exerted every effort to present their respective theories succinctly and clearly. I approach a decision in this case with a deep sense of humility and a feeling of the great responsibility involved. The litigants all have deep religious convictions and are loyal and patriotic Americans although they trace their immediate ancestry to a foreign land. The question of Communism has been raised during the trial but it is very apparent that not one of those involved would countenance Communism for one minute. I have enjoyed trying this case because of the legal questions involved, the opportunity to learn more about one of the world's great religions, but more importantly because it afforded me the privilege of becoming acquainted with such a fine group of people.

A court, viewing the question involved from an impartial standpoint cannot help but wish that such good people would reconcile their differences and again be one happy church congregation, living together in peace and harmony. They all have the same religious beliefs and convictions. Their only real difference is the question of the defrocking of a bishop. This fate of one man should not break up a happy and peaceful religious congregation here in South Bend, Indiana.

Of course I realize there are charges that the management and actions of the church at Belgrade are influenced by the Communist government of Yugoslavia. It is natural that a church, in order to survive in any country, more especially in a Communist country, must obey the laws of that country—must not openly attack the officials of that country. This does not mean that such church must surrender any of its fundamental beliefs or rights. There is

some evidence in this case that the church in Yugoslavia has participated in some of the formal ceremonies of the Communist government. This would be natural with a church that always had a close link with the government of the country in which it was located, which, by the way, is unknown in the United States. There is also some evidence that some government officials of Yugoslavia have from time to time composed oppresive rules and regulations upon the church there. However, there is no credible evidence that the government of Yugoslavia has taken any part in the decision by the Holy Assembly of Bishops to divide the Serbian Eastern Orthodox Diocese of the United States of North America and Canada into three separate dioceses and to defrock Bishop Dionisije.

In the case at bar it is not the duty of this court to decide whether or not the bishop was justly or unjustly defrocked. This question is purely within the jurisdiction of the church government with headquarters at Belgrade and will not be disturbed by the courts.

We must not lose sight of the fact that the local church is a part of "The Serbian Eastern Orthodox Diocese of the United States of North America and Canada." (See Exhibit "C") The Serbian Orthodox Diocese of the United States of North America and Canada was duly incorporated under the laws of the State of Illinois in 1935 and adopted a constitution (see Exhibit "B") which was approved by the Serbian Orthodox Church of Yugoslavia. This constitution adopts the ecclesiastical and canonical authority and position of the Belgrade church (see Articles 1 and 2) but expressly reserves to itself "full administrative freedom, and accordingly it can independently regulate and rule the activities of its church, school, and other

diocesan institutions and all funds and beneficiaries, through its organs, but in accordance with the laws of this constitution and in agreement with the laws of the United States and Canada." (See Article 3) Thus a new church of the Serbian Orthodox faith was created in the United States and Canada.

The constitution of the Belgrade church (Mother church) (Exhibit "F", Article 15, Paragragh 1) expressly excludes this organization from its regular dioceses but states that "in matters spiritual and hierarchical, to the Serbian Orthodox Church also belong these dioceses which are abroad: 1. The Serbian Orthodox Church in the United States of America and Canada, with its see in Chicago or Monastery of St. Sava, in Libertyville, Illinois."

Certainly no authority other than the Illinois corporation, itself, has any right to amend, change, or disregard the constitution of the said Illinois corporation. There is nothing in the world to prevent the Belgrade Church from setting up as many new churches and dioceses in America as it desires, but that does not mean that it can break up and in effect dissolve *the church organization created by the Illinois corporation and take away from it its property.* It follows that these defendants are free to leave their church and to join the new church thus established by Belgrade, if they wish, but they cannot take the church property with them. This church property is an inherent part of The Serbian Orthodox Diocese of the United States of North America and Canada and must remain so unless changed by its authority.

The Holy Assembly of Bishops of the Serbian Patriarchate has the authority to defrock all bishops and to appoint a bishop for this entire diocese, but *it has no authority to appoint a bishop for only a part of the diocese.* In other

words, it has authority to appoint Bishop Firmilian or any other bishop for the diocese of the United States of North America and Canada, *but no authority to break up the diocese into parts.*

The Illinois Corporation established a church wholly independent of the Mother Chuch in Belgrade, retaining the same religious beliefs and practices and granting to the church in Belgrade authority only to appoint its bishop.

The property of the South Bend church is held in various names, as follow: "Serbian St. Peter and Paul Church" (see Exhibit A-2); "Serbian St. Peter and St. Paul Orthodox Church" (see Exhibit B-2); "Serbian Orthodox Church of St. Peter and St. Paul" (see Exhibit L-4); "Serbian Orthodox Saint Peter and Paul Church" (see Exhibit M-4); and "St. Peter and Paul Serbian Church" (see Exhibit N-4). In my humble opinion this real estate is all held in trust for the people of South Bend and vicinity who are of the Serbian Orthodox faith and are loyal to the diocese of the United States of North America and Canada, as governed by the Illinois corporation. (See Exhibit "C", Article 2)

Nothing would be gained by citing and quoting from the legal authorities upon which this opinion is based. Suffice it to say that this Court is of the opinion that the principles announced by the United States Supreme Court in Watson vs. Jones, 13 Wall, 679; 20 Law Ed. 666-1872—are still the law of Indiana, this despite the opinion of Professor Carl Zollman. It is true that some authorities make a distinction between property rights and doctrinal rights, where same can be clearly separated, but the overpowering question in the case at bar is the authority of the central church, the Serbian Orthodox Diocese of the United States of North

America and Canada, over the ecclesiastical affairs of its local churches. The property of its local churches is incidental and follows those who remain true to that church.

The evidence shows that the names of the parties in the plaintiff faction were crossed from the records of membership. It was explained that this was done because their dues had not been paid. There is no evidence that the members of the plaintiff faction have been barred from the church services. Therefore, I do not believe the court would be justified in assessing any penalties against the defendants for contempt of court.

I am going to ask the attorney for the plaintiffs to prepare a decree and submit it to counsel for the defendants and to the court. We will not enter the decree until it can be studied by all concerned and suggestions made for changes or corrections.

Respectfully submitted,

/s/ *Aldo J. Simpson*
Aldo J. Simpson

AJS:lz

IN THE

COURT OF APPEALS OF INDIANA
THIRD DISTRICT

NICK DRASKOVICH, STEVE KASANOVICH, GORDON CHURCHIA, DANIEL GRUBESICH, NICK MEDICH, MIKE UZELAC, DAN RADMAN, WALTER MILOVICH,

Defendants-Appellants,

vs.

NOVAK PASALICH, ADDIE MAKSIMOVICH, MICHAEL PASALICH, LAZAR MAKSIMOVICH, FRED MEDICH, JOHN ZIVKOVICH, MICHAEL PETKOVICH

Plaintiffs-Appellees.

No. 172 A 13

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC

Pursuant to Appellate Rule 11 of the Indiana Rules of Procedure, Plaintiffs-Appellees now, and within twenty (20) days from rendition of the Decision of the Third District of this Court herein on March 20, 1972, petition the Court of Appeals for a rehearing en banc, showing as grounds for this petition as follows:

1. The Decision of the Third District of the Court of Appeals of Indiana erroneously decides the following new questions of law:

A. In holding and finding that all organic instruments of "hierarchical" church organizations or religious societies constitute part of the polity

or articles of church government in respect to spiritual, sacramental, and canonical matters; that such organic instruments are therefore sources of spiritual or religious doctrine as well as of the tenets of the faith; and therefore are for all purposes ecclesiastical instruments the construction and application of which require theological expertise; by reason of which it is therefore decided erroneously as a new question of law in the State of Indiana that none of such organic structural instruments, nor any relevant parts thereof, are secular documents, all of which ultimately results in a holding that in resolving property disputes within church organizations there are no neutral principles of law available for the interpretation, construction and application of such organic instruments.

B. In holding and finding, contrary to the overwhelming weight of the evidence in this cause, that the purported decision of the Belgrade Church organizationally to alter the structure of the American-Canadian Diocese of the Serbian Eastern Orthodox Church constituted a subdivision or reorganization, when in fact as is undisputed on the record it constituted an attempt to dissolve or abolish the American-Canadian Diocese and to create in its stead three new dioceses, the purported dissolution being plainly beyond any arguable powers of the Belgrade Church by application of neutral principles of law to the organic church instruments and the creation of three new dioceses being arguably within the prerogatives of the Belgrade Church, but, apart from the attempted substitution of the latter for the former, this is a matter which is neither in dispute here nor germane to the justiciable issues that are in dispute.

C. In holding and finding, contrary to the overwhelming weight of the evidence, that the purported dissolution or abolition of the American-Canadian Diocese by the Belgrade Church constituted the effectuation of an ecclesiastical, hierarchical, spiritual, canonical or doctrinal decision affecting the tenets of the faith of the Serbian Eastern Orthodox Church and was not a purported attempt to effectuate an administrative decision as to which the Belgrade Church had in its Constitution preserved no authority, jurisdiction or power.

D. In holding and finding that the powers preserved unto the Belgrade Church in respect to administrative matters affecting dioceses geographically within the national borders of the State of Yugoslavia applied also to affiliate dioceses outside those borders, in clear contravention of the plain meaning of the words employed in the organic church instruments here involved, including particularly the Constitution of the Belgrade Church and the Constitution of the American-Canadian Diocese, all of which is readily determinable by neutral principles of law and none of which transgresses in any way values embodied in the First Clause of the First Amendment to the Constitution of the United States of America.

E. In failing to distinguish between what are identified in the record as "Article 14 Dioceses" and "Article 15 Dioceses" when applying the jurisdictional powers preserved unto the Belgrade Church by Article 16 of the Constitution of the Belgrade Church.

2. The Decision of the Third District of the Court of Appeals of Indiana contravenes ruling precedent of the Supreme Court of Indiana on each and all the following points as stated in each and all the following cases:

A. In determining the sufficiency of the evidence to support the Trial Court judgment the Reviewing Court on appeal does not weigh the evidence, does not resolve credibility conflicts, and reverses on grounds of sufficiency of evidence only when the evidence is without dispute and entitles the party against whom judgment was entered below to a judgment as a mattter of law:

Hinds v. *McNair* (1955), 235 Ind. 34, 129 N.E. 2d 553;
Pokraka v. *Lummas Co.* (1952), 230 Ind. 523, 104 N.E.2d 669; and
Allison v. *Boles* (1967), 141 Ind. App. 592, 230 N.E.2d 784,

the breach of which principles occur here in the manner in which the Third District implicitly finds that the Trial Court erred in its conclusion, based on conflicting evidence that clearly preponderated in favor of the Trial Court's resolution thereof, that the Belgrade edict constituted an attempt to *dissolve* or *abolish* the American-Canadian Diocese and that determination of diocesan boundaries is as to dioceses geographically outside the State of Yugoslavia an administrative matter and not one involving the tenets of the faith of the Serbian Eastern Orthodox Church, and thus is not as to such non-territorial dioceses within the powers preserved unto the Belgrade Church by its Constitution nor conferred upon it by the Constitution of the American-Canadian Diocese.

B. In property disputes or any other controversies involving religious societies or church organizations generally, neutral principles of law apply, which ruling precedent is established in the decision of the Supreme Court of Indiana in the following case:

3. There is an irreconcilable conflict between the decision of the Third District of the Court of Appeals of Indiana in this case and the decision of Division One of its predecessor court, the Appellate Court of Indiana, as enunciated in *United Methodist Church in the United States* v. *St. Louis Crossing Independent Methodist Church* (Ind. App., 1971), 276 N.E.2d 916, in that in the Appellate Court case the ruling precedents of the Supreme Court of Indiana and of the Supreme Court of the United States are discerned and properly followed, particularly on the issue of application of neutral principles of law, whereas in the instant case, as noted in Parts 1A., B., C., D. and E., above, the decision of the Third District concludes that in respect to church organizations classified as "hierarchical" as to spiritual or doctrinal matters there are no circumstances in which neutral principles of law can apply, which conflict also exists as between the decision of the Third District in the instant case and the decision of the Appellate Court of Indiana in *Merryman* v. *Price* (Ind. App., 1970), 259 N.E.2d 883.

4. The decision of the Third District of the Court of Appeals of Indiana in this case fails to give a statement in writing and instead merely states unreasoned conclusions as to the following disputed substantial questions arising on the record, argued by the parties, and as to which a *decision* was required:

> A. That the pretended edict of the Belgrade Church affecting the internal administration of the American-Canadian Diocese constituted a dissolution or abolition of the American-Canadian Diocese and not a purported subdivision only.

B. That the pretended edict of the Belgrade Church constituted interference in administrative matters, as opposed to ecclesiastical-hierarchical matters in the sense of interpretation and application of the canons or tenets of the faith, the former of which was in no way preserved unto the Belgrade Church nor conferred upon it by the American-Canadian Diocese and the latter of which, while in fact preserved unto the Belgrade Church, constitutes no part of the instant controversy.

Wherefore, Plaintiffs-Appellees respectfully pray for a rehearing by the Court of Appeals of Indiana and, because of the conflicts between the decision of the First District in the instant case and those announced by the Supreme Court of Indiana as well as those announced by this Court's predecessor, the Appellate Court of Indiana, respectfully suggest that such rehearing be held by the Court en banc; and Plaintiffs-Appellees respectfully pray that upon rehearing the Opinion of the Third District herein be withdrawn and the Decision vacated; and that the judgment of the Elkhart Circuit Court be thereafter in all things affirmed.

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Attorney For Plaintiffs-Appellees

IN THE SUPREME COURT OF ONTARIO

The Honorable Mr. Justice Wilson
Tuesday, the 20th day of April, A.D. 1965

Between:

Petar Mirkovich; Savo Tanjurdzich; George Bulat; Dusan Macesic; Zika Jovanovich; on behalf of themselves and all the other members of St. George Serbian Orthodox Church-School Congregation of Niagara Falls, an unincorporated association, being a component part of the Serbian Eastern Orthodox Diocese of the United States and Canada,

Plaintiffs

—and—

Rade Bozanich; Bosko Raseta; Predrag Zekavica; Nada Jovetich; Ilija Jovetich; Jovo Surla; George Sainovich; Ljubomir Stojanovic;

Defendants

JUDGMENT

This Action coming on for trial on the 12th day of April, A.D. 1965, and continuing on the 13th, 14th and 15th days of April, at the sittings holden at Welland for the trial of actions without a jury, in the presence of Counsel for all parties, and upon hearing read the pleadings and hearing read the statement of admissions as to fact, and the Exhibits, and on hearing the evidence adduced, and what was alleged by Counsel aforesaid, this Court was pleased to direct this action to stand over for Judgment, and the same coming on this day for Judgment.

1. This Court Doth Declare that the lands and premises as set out in Paragraph "6" of the Statement of Claim, are held by Trustees for and on behalf of St. George Serbian Orthodox Church-School in the City of Niagara Falls as represented by the Plaintiffs and doth order and adjudge the same accordingly.

2. And This Court Doth Further Declare that the Officers and Administrative Board, as elected at the Annual Meeting on December 8th, A.D. 1963, were the duly elected Administrative Board and Officers of St. George Serbian Orthodox Church-School for the year 1964, and doth order and adjudge the same accordingly.

3. And This Court Doth Further Order And Adjudge that the Defendants and those whom they represent, and their agents be and are hereby restrained from, in any way interfering with the use and enjoyment by the Plaintiffs, and those whom they represent, of the said lands and premises as set out in Paragraph "6" of the Statement of Claim, and that the Defendants and those whom they represent, and their agents, be and are hereby restrained from entering on or using the said lands and premises as set out in Paragraph "6" of the Statement of Claim, unless they conform to the orders of the said Officers and Administrative Board of St. George Serbian Orthodox Church-School and their lawful successors.

4. And This Court Doth Further Order And Adjudge that the Defendant Ljubomir Stojanovic be and he is hereby restrained from representing himself as the Priest of St. George Serbian Orthodox Church-School, and that the said Defendant be and is hereby restrained from, in any way, interfering with the activities of the St. George Serbian Orthodox Church-School Congregation.

5. And this Court Doth Further Order And Adjudge that the Defendant Ljubomir Stojanovic deliver up forthwith to the Plaintiffs all the Church-School property and sacred articles belonging to St. George Serbian Orthodox Church-School which may be in his possession, or under his control.

6. And This Court Doth Further Order And Adjudge that the Defendants do pay to the Plaintiffs their costs of this action and their costs of the Motion for Injunction made before Mr. Justice Schats, forthwith after taxation thereof.

7. And This Court Doth Further Order And Adjudge that the Counter-Claim of the Defendants be and the same is hereby dismissed.

8. And This Court Doth Further Order And Adjudge that the Defendants do pay to the Plaintiffs their costs of the counter-claim forthwith after taxation thereof.

Judgment Signed this 9th day of September A.D. 1965.

"P. Brown" (seal)
Deputy Local Registrar

Entered in J.B.
at Folio 287
On September 9, 1965
at Welland Ont.
P.B.

REASONS FOR JUDGMENT

His Lordship: This action is a contest between two groups in the St. George Serbian Orthodox Church School Congregation for possession and control of the congregation's real and personal property.

The plaintiffs were elected officers of the congregation at the Annual Meeting held on December 8, 1963, and they sue on behalf of themselves and all other members of the congregation.

The defendants were elected at a meeting of the congregation called and held on January 19, 1964, which meeting declared the December meeting to be null and void. In their counterclaim the defendants seek possession and control of all the church property.

To understand the rival claims it is necessary to give an historical account, not only relating to the congregation, but to development of the Serbian Ohthodox Church of Belgrade, Yugoslavia, in North America. The church is an ancient religious body of an hierarchical nature. It is headed by a Patriarch, under whom are a Holy Assembly of Bishops, a Holy Synod of Bishops, a Supreme Ecclesiastical Court, Patriarchical Council and Executive, Diocesan Bishops, Diocesan Ecclesiastical Courts, Councils and Executive Committees. Then there are Rectors, the Church Congregational Councils and Church Congregational Executive Committees. The church has a written Constitution, the 1957 edition of which was before me as Exhibit "B" to an agreed statement of facts, filed at the opening of the trial.

In North America there was no organized diocese of the church in 1913. Between that year and 1927 there existed several independent congregations of Serbian people, who first united under the Russian Orthodox Church, although the Serbian Orthodox Church did supply some of the priests to these congregations.

In 1927 a Bishop Mardary called together the first sabor (convention of laymen and clergymen) in Detroit, Michigan. On that occasion the meeting drew up and adopted a Constitution which created the Serbian Orthodox Diocese in the United States of North America and Canada (in paragraph 2 of the statement of facts called the Serbian Eastern Orthodox Diocese for the United States of America and Canada) Exhibit "A" to the statement of facts.

On December 1, 1928, this Constitution was approved by the Holy Bishops Synod of the Serbian Orthodox Church at Belgrade, constituting official approval of the Constitution for the Diocese. It should be pointed out that the church's constitution regulated all of the other dioceses into which the church was divided, but it did not regulate the affairs of the North American Diocese in its temporal aspects. By Article 1 of the Diocesan Constitution it is declared that the diocese is considered ecclesiastically judicially as an organic part of the Serbian patriarchate and enjoys all the benefits which originate therefrom.

By Article 2, all statutes and rules which regulate the ecclesiastical-canonical authority and the position of the Serbian Orthodox Church in Yugoslavia are also compulsory for the diocese, with exceptions which need not be noted.

By Article 3 the diocesan jurisdiction "includes the entire political territory of the United States of America and Canada, which, as such, by its geographical location, enjoys

full administrative freedom, and accordingly it can independently regulate and rule the activities of its church school and other diocesan institutions and all funds and beneficiencies through its organs but in accordance with the laws of this Constitution and in agreement with the laws of the United States of America."

By Article 8: "the diocesan authorities decide independently on all matters within their jurisdiction and in accordance with this Constitution so that the protection of the civil authorities cannot be sought against their decisions except if same conflicts with the laws of the United States and Canada."

Heading the diocese is the Diocesan Bishop, who is appointed by the Holy Assembly of Bishops in Belgrade (Article 9). He is obliged to recognize the head of the Serbian Patriarahate and he is not to make any changes or innovations in the established order of work of the church without prior agreement with the Patriarchate (Article 12).

On May 15, 1935, the diocese was incorporated under the name Serbian Eastern Orthodox Diocese for the United States of America and Canada at Lake County, Illinois, as a religious corporation pursuant to the Corporations Act of the State of Illinois. The incorporators were Bishop Mardary, who by this time was bishop of the diocese, and seven other trustees, lay and ecclesiastical.

For the defendants it was contended that both the spiritual and temporal aspects of the diocese were incorporated, but I find, on the basis of the evidence given by Mr. Fisher, a duly qualified attorney from the State of Illinois, that only the temporal aspects were incorporated.

In 1940 Bishop Dionisije became the bishop of the diocese. In 1953 the Serbians in Niagara Falls, Ontario, formed St. George's Serbian Orthodox Church School Congregation as an unincorporated body. On July 30, 1957, it acquired the real property now the subject matter of the dispute, by a deed to Pane Yerich et al. "as Trustees for the St. George Serbian Orthodox Church of Niagara Falls."

On February 9, 1958, the congregation adopted the by-laws governing its operation (Exhibit "H"). By Article 3 it is declared to be a "component part of the Serbian Orthodox Diocese for the United States of America and Canada, and as such will strictly adhere to all provisions of the Diocesan Constitution, church canons and other rules and orders provided by the diocesan authorities."

By Article 4 "The aim and purpose of the Serbian Orthodox Church Congregation 'Saint George' in Niagara Falls, Ontario, is to maintain and advance the church school and all other institutions beneficial for the spirit of Serbian Orthodoxy. . . ."

According to Article 7 "every newly accepted member of the church congregation is obliged to take an oath of obedience to all regulations provided by this by-law and by the constitution of the diocese as well as all rules and orders of the diocesan authorities." This Constitution was approved by the Diocesan Bishop on December 25, 1958.

On February 13 and May 25, 1962, the Church Peoples' Council of the Diocese requested the Holy Council of Bishops in Belgrade "in view of largeness and spaciousness of this diocese" to elect for the diocese more bishops. On February 7, 1963, the Diocesan Council decided to summon a meeting of the Church National Assembly, its main legislative body, to meet on October 15, 16 and 17 next. On April

17 the Diocesan Executive Board also decided to summon this meeting. Presumably it is the channel through which the Diocesan Council acts for such a purpose.

On May 10, 1963, the Holy Council of Bishops in Belgrade acknowledged requests from the Church People's Council of the American-Canadian Diocese and American-Canadian Bishop Dionisije for more bishops made on February 13, 1962, and again on May 25, 1962. Instead of granting this request, the Holy Council of Bishops, acting under section 16 of the Constitution of the Serbian Orthodox Church, formed three dioceses one of which was (3) a mid-eastern Canadian-American Diocese with the see in Detroit, in which was included the parishes . . . in Canada. The decision went on to provide that "as soon as the newly-formed dioceses obtain their bishops the necessary diocesan bodies and organs will be formed immediately. The final delimitation of the newly organized dioceses and the adjustment of the existing church by-laws to the newly created situation and all other questions pertaining to the church organization of those dioceses will be studied by the juridical bishops (Belgrade) and the Church People's Council and the Holy Assembly of Bishops will pass final judgment on these proposals."

On the same day the Holy Assembly of Bishops in Belgrade suspended Bishop Dionisije from priestly functions and directed him to relinquish the government for the Serbian Eastern Orthodox Diocese for the United States of America and Canada to Bishop Firmilian, who had been newly appointed Administrator in May, 1963. After receiving the above decision of the Holy Assembly of Bishops, the meeting of the Church National Assembly in the United States was advanced to August 6, 7, 8 and 9, 1963.

On May 17 the Holy Assembly of Bishops elected Bishop Stefan as bishop of the Middle-Eastern American Diocese. He succeeded the Administrator Firmilian, who was appointed bishop of the Middle-Western American Diocese. For some years prior to their elevation to the position of bishop, both these men had been priests in the Serbian Eastern Orthodox Church Diocese for the United States of America and Canada.

On June 2 at the regular meeting of the St. George Congregation, a letter from Bishop Dionisije was read calling the Church People's Conference in October. While this was being discussed there was an interruption during which was read a letter from the Holy Synod of the Serbian Orthodox Church in Belgrade, advising the Congregation of the reorganization ordered on May 10 and of the temporary suspension of Bishop Dionisije until the final decision of the Church Court, and that the administration of the Diocese had been confided to Bishop Firmilian. The minute also records:

> "Holy Serbian Orthodox Church appeals to all of us to obey this decision and listen to the voice of the Mother Church."

In another minute there appears the following:

> "To this report no commentary is necessary but it was accepted as known for execution."

A still later minute records:

> "Afterwards the letter of Bishop Dionisije was read in connection with the letter of the Holy Synod. In this letter Bishop Dionisije does not recognize the separation of the present Diocese, nor the punishment told, or suspension of clerical duties until it will be proved that he is guilty. He invites all the Serbs of America and Canada to refuse the decision of the Holy Synod as unjust and uncanonical."

On July 23 at an Extraordinary Meeting of the Congregation a letter was read from Bishop Stefan advising the congregation not to send delegates to the August meeting on the ground that it was called for by irresponsible persons and therefore illegal. The following minute was made on this occasion:

> "Members of this Congregation at the meeting of 2nd June, 1963, accepted the decisions of the Holy Synod of the Serbian Orthodox Church, and accused and condemned the separatist action of the suspended Bishop Mr. Dionisije, so the act of Bishop Mr. Stefan has been acknowledged, and advice accepted not to send delegates to the aforementioned conference."

On August 8 the Church National Assembly passed a resolution declaring the divisions of the Diocese into three dioceses unlawful, unconstitutional and void, and refusing to recognize the suspension of Bishop Dionisije, and the appointment of Bishop Stefan as Bishop.

At the regular meeting of the congregation on October 6 problems arising out of the actions by the Church National Assembly were discussed, with the result that the Congregation decided a Special Meeting would be called at which a vote would be taken to decide whether to accept the decisions of the Holy Synod, namely of the Patriarch, or not. The meeting also voted confidence in the local Priest, Father Stojanovic.

On October 28 the congregation executive sent to all members a notice of a Special Meeting for November 17, with the following agenda:

> "1. Do you recognize decisions of the Synod, namely Patriarchate of Serbian Orthodox Church, or do you not? We beg your participation at this very important meeting."

On November 3 the congregation held its regular Congregational Meeting, and set the date for the Annual Meeting, namely December 8, 1963.

On November 17 at the Special Meeting sixty-five out of a total of one hundred and twenty full-fledged members attended. Sixty-three voted for the question, namely that they recognized the decisions of the Holy Synod. Two members abstained.

> "According to this, this Church remains in unison with the Patriarchate of Serbian Orthodox Church."

On November 23 the Executive Committee sent out to members of the congregation the notice of the Annual Meeting for December 8. The agenda was stated to include:

> "4. Election of the new executive for the following year.
>
> "5. Election of Trustees."

On December 8 this meeting was attended by seventy-seven members: officers and the Administrative Board were elected. The plaintiffs were elected members of the Board.

On January 21, 1964, Bishop Stefan wrote to the St. George Congregation reciting the activities of Father Stojanovic in supporting Bishop Dionisije and forbidding him temporarily to perform clerical duties, on grounds of paragraphs 219 and 221 of the Constitution of the Serbian Orthodox Church, and paragraph 210 procedures from the courts of the Serbian Orthodox Church (Belgrade)

> "as he with his clerical guilty behaviour and stepping on clerical oath, and provoked shock in the people and is not an example to the clerical profession",

and on other grounds. The letter also informed the congregation of the names of two of the clergy to perform the local priest's duties.

On January 19 a letter was written to Father Stojanovic by the President and Secretary of the Congregation, as follows:

> "On the 19th day of January, 1964, immediately following the Holy Liturgy an announcement was made by you to the congregation in attendance, stating that you do not recognize the Board of Executives of the Parish of St. George Serbian Orthodox Church, as elected at the regular Annual Meeeting according to our Parish By-Laws, on the 8th day of December, 1963.
>
> "The Board of Executives considered your action as outlined above, and made this decision: that with this, your action, you voluntarily ceased to be our Parish Priest commencing with the 19th day of January, 1964.
>
> "According to Article 40 of our Church By-laws, you will return to the Board of Executives all church vestments and articles sacred and non-sacred, including all church books."

On February 21, 1964, the President of the Congregation's Administrative Board wrote to Father Stojanovic advising him that he and those who purport to follow him have no right of entry to the church premises, which will be locked and not available to them. The letter also requests the return of church property listed in the letter.

On March 17, 1964, the plaintiffs commenced this action. At the same time they served a Notice of Motion returnable on April 27, for an injunction prohibiting the defendants and those whom they represent from entering upon and using the church lands and premises. On the return of the motion the parties agreed that, pending the disposition of the action and without prejudice to the rights of the parties to it, the members of the congregation as represented by

the plaintiffs and defendants would each hold separate services within the church building until further order of the Court, or the disposition of the action.

At the trial at Welland the parties agreed to the facts set forth in an agreed statement, and the exhibits to which the statement refers. The only exception to this was the calling of Mr. Henry D. Fisher, an Attorney-at-Law from Waukegan, Illinois, to prove the law of that State relevant to this action. He gave it as his opinion that the incorporation of the Diocese under the Religious Corporations Act of that State was an incorporation of the temporal aspects, and not of the ecclesiastical aspects of the Diocese. Insofar as this action is concerned, the parties are agreed that the St. George Church real and personal property belongs to the local congregation, and not to the Illinois corporation, or to the Church in Belgrade.

Much time was devoted to a review of the Constitution of the Mother Church in Belgrade and the Constitution of the Diocese, with the object on behalf of the plaintiffs of establishing that by the action taken by the Diocese in declaring itself autonomous and in refusing to acknowledge the removal of Bishop Dionisije, and by the congregation in adhering to the Mother Church, they are entitled to the relief asked in this action.

On behalf of the defendants it is contended that the congregation ought to take its direction from the Diocesan officials as they did before the breach with Belgrade. Consequently, they are entitled to succeed upon the counterclaim.

However, I think it is unnecessary to go into many questions argued before me. It is important to bear in mind the claims made on behalf of the plaintiffs, and those made by the defendants in their counterclaim. The plaintiffs ask

(a) for an order declaring that the church lands and premises are held by the Trustees for and on behalf of St. George Serbian Orthodox Church School, as represented by the plaintiffs, and other members loyal to the established Patriarchate of the Church.

(b) an order declaring that the officers and Administrative Board as elected at the Annual Meeting on December 8, 1963, are the duly elected Administrative Board and officers of St. George Serbian Orthodox Church School.

(c) for an injunction restraining or prohibiting the defendants and those whom they represent and their agents from entering upon or using the church lands or in any way interfering with the use and enjoyment of them by the plaintiffs and those whom they represent.

(d) an injunction restraining Father Stojanovic from representing himself as a Priest of the congregation and from interfering in any manner with the activities of the Church School and for a mandatory injunction directing him to comply with the order of Bishop Stefan dated January 21, 1964, and specifically to deliver all the Church School property and sacred articles as required by the said order.

The defendants in their counterclaim ask (a) an order declaring that the lands and premises are held by Trustees for and on behalf of St. George Serbian Orthodox Church School Congregation as represented by them.

(b) an order declaring that the officers and Administrative Board elected at the meeting on January 19, 1964, are the duly elected officers and Administrative Board of the Congregation.

(c) for an injunction restraining or prohibiting the defendants by counterclaim and those whom they represent from entering on or using the church lands and premises or in any way interfering with the use and enjoyment thereof by the plaintiffs by counterclaim and those whom they represent.

(d) an injunction restraining Rev. Zarko Mitrovic, a member of the Church School Congregation, from representing himself as its Priest.

The plaintiffs and those whom they represent are those who adhere to the Mother Church in Belgrade and its dogmas. The defendants are those who support the decision of the Diocese to refuse to accept the action of the Belgrade authorities in suspending Bishop Dionisije, who was divested of his episcopal and monastic ranks, removed from the roll of the hierarchy of the Serbian Orthodox Church and returned to his status as a layman by a judgment of the Holy Episcopal Council of the Serbian Orthodox Church at Belgrade on March 15, 1964.

On behalf of the defendants it was admitted that Bishop Dionisije could be dismissed, and I find that he was dismissed following the suspension properly imposed upon him. However, it is contended nevertheless that the admitted membership of the Congregation in the Diocese requires it to take its direction from the Executive of the Diocese. It is contended that notwithstanding the temporary and physical breaking away from the Church in Belgrade, there has been no departure from the Patriarchate in Belgrade.

Before dealing with this particular aspect of the case I shall deal with the counterclaim which may be disposed of very quickly. The evidence establishes quite clearly that

the purported election of officers and Administrative Board on January 19, 1964, was in fact a nullity. It was called without proper notice to the members of the Congregation, given on the morning of January 19, and held on the evening of the same day. No provision of the Congregation's By-laws relative to holding such a meeting was observed. The only officers and Board properly elected in accordance with the By-laws were those elected at the Annual Meeting on December 8, 1963. It follows that an injunction should not issue as asked in paragraphs (c) and (d) of the counterclaim supra. It also follows that the Trustees who were properly elected by the congregation at its proper meeting are the Trustees of the church property.

I have come to the conclusion that the action of the congregation in affirming its allegiance to the Patriarchate acted properly in the circumstances. The Diocesan Constitution adopted when the Diocese was organized in 1927 expressly provided in Article 1 that the Diocese is considered ecclesiastically-judicially as an organic part of the Serbian Patriarchate in the Kingdom of Yugoslavia and enjoys all the benefits which originate from it.

By Article 2 all statutes and rules which regulate the ecclesiastical-canonical authority and position of the Serbian Orthodox Church in the Kingdom of Yugoslavia are also compulsory for the Serbian Orthodox Diocese in the United States of America and Canada, with the exception of specific cases which must be formulated with regard to local circumstances in accordance with ecclesiastical and judicial principles.

By Article 3 the Diocese enjoyed full administrative freedom, and accordingly it was given power independently to regulate and rule the activities of its church school and other diocesan institutions and all funds and beneficiencies through its organs.

By Article 4 every Serbian Orthodox Church School Congregation was required to be in ecclesiastical-canonical bond with the diocese and recognize its authority and power.

Later the Constitution makes provision, in Article 153, which says: "The Church School Congregation property is all that property without exception acquired by individual congregations with their material means." This is in accordance with the admission made at the beginning of the trial, that the church property belongs to the congregation. However, the Diocesan Bishop (in this case Bishop Dionisije) by Article 12 of the Diocesan Constitution was obliged to recognize the head of the Serbian Patriarchate in Belgrade, and "he shall not make any changes or innovations in the established order and work of the church without prior agreement with him."

> "Accordingly, the Diocesan Bishop shall submit to the Serbian Patriarch for review all regulations which may be issued by any diocesan authority, which shall, if they touch upon the sphere of the internal church administration, be subject to the approval of the Holy Pontifical Synod, as the highest executive church authority."

By Article 23 the Diocesan Church National Assembly decides on changes and amendments to the Constitution with the approval of the Holy Bishops' Assembly of the Serbian Patriarchate.

It is quite clear in this case that, at the meeting held in August, 1963, the Church National Assembly went far beyond its powers and acted quite improperly in resolving:

> "1. The Serbian Orthodox Diocese in the United States of North America and Canada be and the same is hereby reformed to be completely autonomous in its administrative temporal and canonical and hierar-

> chical affairs and free from all rules, regulations, orders, decrees or obstructions emanating from the captivity of the Patriarch of the Serbian Orthodox Church and Holy Synod of Bishops."

It also passed many other resolutions amending various Articles of the Constitution as set out in Exhibit "G" to the statement of facts. None of these amendments, of course, could be made without the approval of the Holy Bishops' Assembly. Consequently, the Constitution as it appears in Exhibit "A" to the statement of facts appears to be still in force.

The real conflict between the diocesan authorities and the authorities in Belgrade seems to arise out of the actions of the Holy Council of Bishops on May 10 already referred to. It is apparent, therefore, that Bishop Dionisije, in calling together the Church National Assembly, and in persuading the body to take the action it did, committed offenses against the church, and that these resulted in his removal as a bishop. Consequently, he has no status to rule the diocese or to demand obedience to him from the St. George Congregation. It is impossible, therefore, to hold that the defendants are the proper persons to obtain the relief which they ask in the counterclaim, as being the true followers of the Mother Church in Belgrade.

On behalf of the plaintiffs it was contended that the following three principles should be applied in this case: (1) Courts are reluctant to interfere with the government of ecclesiastical bodies; (2) Courts generally speaking only interfere when property or civil rights are in issue (e.g. use of church property); (3) Where a schism occurs and there is dispute between two factions as to the use of church property, the Court must inquire what was the true identity of the church before the schism, and it will uphold the

rights of those members who still owe allegience to the true church.

Many cases were cited by counsel in support of their respective arguments. In most the Courts were called upon to decide whether or not the terms upon which property had been conveyed to a congregation or its trustees had been violated. In others a minority group in a whole church or a congregation contended that the church had departed from its original constitution. Of the latter type of case, *Dorland* v. *Jones* (1885) 12 O.A.R. 543, affirmed 14 S.C.R. 39 sub nom. *Jones* v. *Dorland,* is a good example. Haggerty, C.J.O. reviewed many authorities including *Watson* v. *Jones,* 13 Wallace 379, a decision of the Supreme Court of the United States, from which I shall soon quote with approval a relevant portion. At page 555 Chief Justice Haggerty had this to say:

> "Their own constitution (i.e. the Church's) seems to afford ample means, by the final authority of the Yearly Meetings, to adjust and regulate such matters (as those in dispute). As far as I can ascertain, this society especially aims to regulate and settle its internal disputes without recourse to outside tribunals."

At page 557 Burton, J. A. said:

> "The Yearly Meeting when once established has final and controlling jurisdiction, as I understand it, in all matters of faith, religious duty, administration and discipline over all subordinate meetings within its territorial limits, and is regarded as having a co-ordinate supreme jurisdiction with other Yearly Meetings, the whole forming the ecclesiastical system known as the Society of Friends."

In the Supreme Court of Canada Ritchie C. J. said at page 43:

> "The attempt to set up a separate quarterly meeting at Pickering, ignoring the yearly meeting regularly

> appointed to meet the following year at Norwich, and not in the regular order of the Society, was so far as I can understand the case, wholly unwarranted and contrary to the discipline and usage, and therefore irregular and void, not having been formed according to discipline, but 'to avoid the rightful authority and controlling action' of the Yearly Meeting to which they were 'subordinate', and in doing so the defendants put themselves out of the society and so ceased to be in unity with the Society of Friends, and therefore cannot properly claim to be the Westlake Monthly Meeting for whose use and benefit this property was purchased.
>
> "I therefore think that the plaintiffs are the persons who now truly and lawfully answer the description of The Westlake Monthly Meeting of Friends, and as such represent the real Westlake Monthly Meeting (Congregation) which is really the only point in controversy."

This case was approved and in effect followed in *Forler* -v- *Brenner* (1922) 21 Ontario Weekly Notes, 489. Although the facts were quite different I think it is reasonable to conclude that those who breach a church constitution cannot expect courts to support them in disputes concerning rights to property. That is the position of Bishop Dionisije and those who support him in this case, as the facts already stated clearly show.

The dispute in *Watson* -v- *Jones* (1871) Supreme Court 13 Wallace, 679 was similar to that in the present case. It concerned two factions in the congregation of Walnut Street Presbyterian Church in Louisville, Kentucky, and arose during the Civil War between the North and the South. The General Assembly of the Church had declared in favour of the abolition of slavery and the majority of the members of the

congregation supported this decision. A smaller group declared adherence to "a Declaration and Testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church of the United States during the last five years." This Declaration, adopted by the Presbytery of Louisville, under whose immediate jurisdiction was the Walnut Street Congregation, denounced in severest terms the action of the General Assembly in the matters just mentioned, declared an intention to refused to be governed by that action, and invited the co-operation of all members of the Presbyterian Church who shared the sentiments of the Declaration, in a concerted resistance to what they called 'the usurpation of authority' by the General Assembly, the top governing body of the Church.

I adopt the conclusion in that case as expressed at page 734 except that for the word "appellants" must read here "defendants."

> "Whatever may have been the case before the Kentucky Court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. . . ."

The decision was that the appellants had no right to the property or to the use of it.

Mr. Justice Miller in delivering the judgment of the Supreme Court of the United States, earlier at page 726, after classifying the questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, and classifying them under three general heads which do not include cases governed by considerations applicable to a church established and supported by law as the religion of the State, said this:

> "But the third of these classes of cases is the one which is oftenest found in the Courts and which with reference to the number and difficulty of questions involved and to other considerations is every way the most important.
>
> "It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself a part of a large and general organization of some religious denomination with which it is more or less intimately connected by religious views and ecclesiastical government.
>
> "The case before us is one of this class growing out of a schism which has divided the congregation and its officers, and the "Presbytery and Synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted for ever by the instrument which conveyed it, or any specific declaration of its owner to the support of any special religious dogmas, or to any particular form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, is entitled to the use of the property. In the case of an independent congregation we have

pointed out how this identity or succession is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a larger church and more important religious organization, and is under its government and control, and is bound by its orders and judgments.

"There are in the Presbyterian system of ecclesiastical government, in regular succession, the Presbytery over the Session or local church, the Synod over the Presbytery, and the General Assembly over all. These are called, in the language of church organs, 'judicatories' and they entertain appeals from decisions of those below, and prescribe corrective measures in other cases.

"In this class of cases we think the rule of action which should govern the civil courts founded in a broad and sound view of the relations of Church and State under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

For the reasons given, the plaintiffs will have judgment (as endorsed on the record and recorded in my notebook No. 39 at page 388) with the following addition: "The plaintiffs will also have the costs of the motions made before Mr. Justice Schatz."

CERTIFIED CORRECT:

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Chartered Shorthand Reporter,
Official Reporter, S.C.O.